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JURIDICAL SELECTIONS.

MARTIN vs. HUNTER.

OPINION

Of the Supreme Court of the United States on the Appellate Authority of that Court in respect to State Courts.

STORY, J. This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause at February Term 1813, to be carried into due execution.

The following is the judgment of the Court of Appeals rendered on the mandate:—"The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States. That so much of the 25th section of the Act of Congress to establish the Judicial Courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act.

That the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court. And that obedience to its mandate be declined by the Court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm that upon their right decision rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself. The great respectability of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is however a source of consolation that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced, has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but, emphatically, as the preamble to the Constitution declares, by "The people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers, which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure; and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were in their judgment incompatible with the objects of the general compact; to make the powers of the state governments in given cases subordinate to those of the nation, or to reserve to

themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not therefore necessarily carved out of existing state sovereignties; nor a surrender of powers already existing in state institutions; for the powers of the States depended upon their own Constitutions, and the people of every State had the right to modify and restrain them according to their own views of policy or of principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively or *to the people*."

The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms. And where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specifi-

cations of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the Legislature from time to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interest should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution, so far as regards the great points in controversy.

The 3d article of the Constitution is that which must principally attract our attention. The 1st section declares, "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress may from time to time ordain and establish." The 3d section declares that "the judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and the treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State

and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under the grants of different states; and between a state or the citizens thereof, and a foreign state, citizens or subjects." It then proceeds to declare that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have *original jurisdiction*. In all other cases before mentioned, the Supreme Court shall have *appellate jurisdiction* both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was in many respects national, and in all supreme. It is a part of the very same instrument which was not to operate merely upon individuals but upon states. And to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative, that Congress could not without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. Could Congress have lawfully refused to create a supreme court or to vest in it the constitutional jurisdiction? "The judges both of the supreme and inferior courts *shall hold* their offices during good behaviour, and *shall*, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." Could Congress create

or limit any other tenure of the judicial office? Could they refuse to pay at stated times the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions. It must be in the negative. The object of the Constitution was to establish three great departments of government,—the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter it would be impossible to carry into effect some of the express provisions of the Constitution. How otherwise could crimes against the United States be tried and punished? How could causes between two states be heard and determined? The judicial power must therefore be vested in some court by Congress. And to suppose that it was not an obligation binding on them, but might at their pleasure be omitted or declined, is to suppose that under the sanction of the Constitution they might defeat the Constitution itself. A construction that would lead to such a result cannot be sound*.

If then it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist,—that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to

* The same expression, "shall be vested," occurs in some other parts of the Constitution in defining the powers of other co-ordinate branches of the government. The first article declares "that all legislative powers herein granted *shall be vested* in a Congress of the United States." Will it be contended that the legislative power is not absolutely vested? The 2d article declares that "the executive power *shall be vested* in a President of the United States of America." Could Congress vest it in any other person, or is it to await their good pleasure whether it is to vest at all? It is apparent that such a construction in either case is inadmissible. Why then is it entitled to a better support in reference to the judicial department?

all. For the Constitution has not singled out any class on which Congress are bound to act in preference to others.

The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a supreme court must be established. But whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If Congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases, the judicial power could no where exist. The Supreme Court can have original jurisdiction in two classes of cases only, viz. in cases affecting ambassadors, other public ministers, and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself. And if in any of the cases enumerated in the Constitution the state courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could not act on state courts) could not reach those cases; and consquently the injunction of the Constitution, that the judicial power "*shall be vested,*" would be disobeyed. It should seem therefore to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance.

They might establish one or more inferior courts. They might parcel out the jurisdiction among such courts from time to time at their own pleasure. But the whole judicial power of the United States should be at all times vested either in an original or appellate form in some courts created under its authority.

This construction will be fortified by an attentive examination of the 2d section of the 3d article. The words are "the judicial power *shall extend,*" &c. Much minute

and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words 'may extend,' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion, the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted, for the American *people* had not made any previous grant. The Constitution was for a new government organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between states; and its structure and powers were wholly unlike those of the national government. The Constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment.

If indeed the relative signification could be fixed upon the term 'extent,' it could not (as we shall hereafter see) subserve the purposes of the argument, in support of which it has been adduced. This imperative sense of the words "shall extend," is strengthened by the context. It is declared that "in all cases affecting ambassadors, &c. that the Supreme Court *shall have* original jurisdiction." Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds—"in all other the cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words,

have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. It is apparent then that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might from time to time require.

Other clauses in the Constitution might be brought in aid of this construction. But a minute examination of them cannot be necessary, and would occupy too much time. It will be found, that whenever a particular object is to be effected, the language of the Constitution is always imperative; and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being then established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial powers shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases in any form in which judicial power may be exercised. It may therefore extend to them in the shape of original or appellate jurisdiction, or both. For there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases, if any, is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls; and

cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to *all cases;* but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "*all*" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies, (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology perhaps a difference of constitutional intention may with propriety be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to *all cases:* and in the latter class to leave it to Congress to qualify the jurisdiction original or appellate in such a manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them. For the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would therefore be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The

same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations. And as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage; in the correct adjudication of which foreign nations are deeply interested. It embraces also maritime facts, contracts and offences; in which the principles of the law and comity of nations often form an essential inquiry. All these cases then enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not therefore to be restrained, but should be commensurate with the mischiefs intended to be remedied, and of course should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases. For although it might be fit that the judicial power should extend to all controversies to which the United States should be a party; yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It ought not have been deemed proper to submit the sovereignty of the United States against their own will, to judicial cognizance, either to enforce rights or prevent wrongs. And as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might in their wisdom choose to apply. It is also worthy of remark that Congress seem in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases the jurisdiction is not limited by the subject matter. In the second, it is made materially to depend upon the value in controversy. We do not however profess to place any implicit reliance upon the distinction which has

hence been stated and endeavoured to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has been so long acted upon and enforced this distinction. But there is certainly vast weight in the argument which has been urged, that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably in some cases exclusive of all state authority, and in all others may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can consistently with the Constitution be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases, where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a constituent jurisdiction. Congress throughout the judicial act, and particularly in the 9th, 11th, and 12th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts*.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject

* But even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be denied that when it is vested, it may be exercised to the utmost constitutional extent.

however to such exceptions and regulations as Congress may prescribe. It is therefore capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may therefore be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must therefore in all other cases subsist in the utmost latitude, of which in its own nature, it is susceptible.

As then by the terms of the Constitution the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the 3d article to any particular courts. The words are "the judicial power, (which includes appellate power) shall extend *to all* cases," &c. and "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction." It is the *case* then, and not *the Court* that gives the jurisdiction. If the judicial power extends to the case it will be in vain to search into the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent then upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the Constitution, laws, and treaties of the United States, or *to all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some* cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive. And this not only when the *casus fœderis* should arise directly, but when it should arise incidentally in cases pending in state courts. This construction would abridge the jurisdiction of such courts far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended for, a discretion be vested in Congress to establish or not to establish inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress,

and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States, not only might but would arise in the state courts in the exercise of their ordinary jurisdiction. With this view the 6th article declares, that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; any thing in the Constitution or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws and treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state. No person can doubt that the jurisdiction completely and exclusively attaches in the first instance to such courts. Suppose at the trial, the defendant sets up in his defence a tender under a state law making paper a good tender, or a state law impairing the obligation of such contracts, which, if binding, would defeat the suit. The Constitution of the United States has declared that no state shall make any thing but gold or silver coin a tender

in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have here passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the State, must not the state court in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult upon any legal principles to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the 6th article would be without meaning or effect, and public mischiefs of a most enormous magnitude would inevitably ensue.

It must therefore be conceded, that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction, if that was already rightfully and exclusively attached in the state courts, which, (as has been already shown) may occur. It must therefore extend by appellate jurisdiction, or not at all. It would seem to follow, that the appellate power of the United States must

in such cases extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon state sovereignties, but only upon the people; and that if the power exists, it will materially impair the sovereignty of the states and the independence of their courts. We cannot yield to the force of this reasoning. It assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon states in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their sovereignties. The 10th section of the 1st article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the states. The language of the Constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the State Legislatures to make laws prescribing the time, place, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State Legislatures. When therefore the states are stripped of some of the highest attributes of sovereignty and the same are given to the United States; when the Legislatures of the states are in some respects under the control of Congress, and in every case are, under the Constitution, bound by the para-

mount authority of the United States,—it is certainly difficult to support the argument that the appellate power over the decision of state courts is contrary to the genius of our institutions. The courts of the United States can without question revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States.

In respect to the powers granted to the United States they are not independent. They are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other subordinate departments of state sovereignty. The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult by such an argument to engraft upon a general power a restriction, which is not to be found in the terms in which it is given. From the very nature of things the absolute right of decision in the last resort must rest somewhere. Wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or the appellate court must pronounce the final judgment; and common sense as well as legal reasoning has conferred it upon the latter.

It has been farther argued against the existence of this appellate power that it would form a novelty in our judicial

institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to Congress, to establish "courts for revising and determining finally *appeals* in all cases of captures." It is remarkable that no power was given to entertain *original* jurisdiction in such cases; and consequently the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was undoubtedly so far a surrender of state authority. But it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensible to the public safety, inasmuch as our national rights might otherwise be compromited and our national peace be endangered. Under the present Constitution the prize jurisdiction is confined to the United States; and a power to revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less important or less useful than it was under the confederation.

In this connexion we are led again to the construction of the words of the Constitution, "the judicial power shall extend," &c. If, as has been contended at the bar, the term "extend" have a relative signification and mean to widen an existing power, it will then follow that as the confederation gave an appellate power over state tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel should choose to adopt such a conclusion.

It is further argued that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases of their own courts; first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed

to be men of learning and integrity; and secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States at any time before final judgment, though not after final judgment. As to the first reason,—admitting that the judges of the state courts are and always will be of as much learning, integrity, and wisdom as those of the courts of the United States, (which we very cheerfully admit) it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers and cannot enquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not enquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct or control, or be supposed to obstruct or control the regular administration of justice. Hence in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens or foreigners, and between citizens and foreigners, it enables the parties under the authority of Congress to have controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated, can be assigned why some at least of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases, the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction; reasons of a higher and more extensive nature touching the saftety, peace, and sovereignty of the nation, might well justisfy a grant of executive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different states, might differently interpret a statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states; and might perhaps never have precisely the same construction, obligation, or efficacy, in any two states. The public mischief that would attend such a state of things would be truly deplorable; and it cannot be believed that they should have escaped the enlightened convention which formed the Constitution. What indeed might then have been prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purpose. It was not to be exclusively for the benefit of parties who might be plaintiffs and would elect the national forum; but also for the protection of defendants who might be entitled to try their rights or assert their privileges before the same forum. Yet if the construction contended for be correct, it will follow that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights.

To obviate this difficulty, we are referred to the power which it is admitted Congress possess, to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution. If it be given, it is only given by implication as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction. It presupposes an original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases, an exercise of appellate and not of original jurisdiction. If then the right of removal be included in the appellate jurisdiction it is only because it is one mode of exercising that power. And as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorise a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is indeed but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must for the same reason exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, can-

not be applied to them. Precisely the same objections therefore exist as to the right of removal before judgment as after, and both must stand or fall together. Nor indeed would the force of the arguments on either side, materially vary, if the right of removal were the exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals*.

On the whole, the Court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorises the exercise of this jurisdiction in the specified cases by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power, and we dare not interpose a limitation where the people have not been disposed to grant one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is a historical fact, that this exposition of the Constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies as the

* The remedy too of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would in many cases be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the state decisions would be paramount to the Constitution. And though in civil suits the courts of the United States might act upon the parties; yet the state courts might act in the same way. And this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

basis of their respective reasonings both in and out of the state conventions. It is a historical fact, that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed as it was not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is a historical fact, that the Supreme Court of the United States have from time to time sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important states in the union,—and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued is, whether the case at bar be within the purview of the 25th section of the judiciary act, so that this court may rightfully sustain the present writ of error. This section, stripped of passages unimportant in this inquiry, enacts in substance that a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or the Constitution, or of a treaty or statute

of, or commission held under the United States, and *the decision is against the title, right, privilege, or exemption, especially set up or claimed by either party under such* clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, *except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.* But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, *than such as appears upon the face of the record and immediately respects the before mentioned question* of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties, is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was therefore equivalent to a perpetual stay of proceedings upon the mandate, and a perpetual denial of all the rights acquired under it. The case then falls directly within the terms of the act. It is a final judgment in a suit in a state court, denying the validity of a statute of the United States; and unless a distinction can be made between proceedings under a mandate and proceedings in an original suit, a writ of er-

ror is the proper remedy to revise that judgment. In our opinion, no legal distinction exists between the cases.

In causes remanded to the Circuit Courts, if the mandate is not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this court. The statute gives the same effect to the writs of error from the judgments of state courts as of the circuit courts; and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error before the Supreme Court. Here is no limitation or description of the cases to which the second writ of error may be applied; and it ought therefore to be co-extensive with the cases which fall within the mischiefs of the statute. It will hardly be denied that this cause stands in that predicament; and if so, then the appellate jurisdiction of this court has rightfully attached.

But it is contended that the former judgment of this court was rendered upon a case not within the purview of this section of the judicial act, and that as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sustain any subsequent proceedings. To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us. The error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which clearly is within our jurisdiction. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be

conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties and could not be re-examined.

In this case however, from motives of a public nature, we are entirely willing to waive all objections and to go back and re-examine the question of jurisdiction as it stood upon the record formerly in judgment. We have great confidence that our jurisdiction will, on a careful examination, stand confirmed as well upon principle as authority. It will be recollected that the action was an ejectment for a parcel of land in the Northern Neck, formerly belonging to Lord Fairfax. The original plaintiff claimed the land under a patent granted to him by the state of Virginia, in 1789, under a title supposed to be vested in that state by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax. The parties agreed to a special statement of facts in the nature of a special verdict, upon which the District Court of Winchester in 1798 gave a general judgment for the defendant; which judgment was afterwards reversed in 1810 by the Court of Appeals, and a general judgment was rendered for the plaintiff; and from this last judgment a writ of error was brought to the Supreme Court. The statement of facts contained a regular deduction of the title of Lord Fairfax until his death in 1781, and also the title of his devisee. It also contained a regular deduction of the title of the plaintiff under the State of Virginia, and further referred to the treaty of peace of 1783, and to the acts of Virginia respecting the lands of Lord Fairfax and the supposed escheat or forfeiture thereof as component parts of the case. No facts disconnected with the titles thus set up by the parties were alleged on

either side. It is apparent from this summary explanation that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant was perfect and complete, if it was protected by the treaty of 1783. If therefore this court had authority to examine into the whole record and to decide upon the legal validity of the title of the defendant, as well as the application of the treaty of peace, it would be a case within the express purview of the 25th section of the act. For there was nothing in the record upon which the court below could have decided but upon the title as connected with the treaty. And if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall then within the very terms of the act.

The objection urged at the bar is, that this court cannot enquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals; and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If therefore that court might have decided the case upon the invalidity of the title (and *non constat* that they did not) independent of the treaty, there is an end to the jurisdiction of this court. In support of this objection much stress is laid upon the last clause of the section which declares that no other cause shall be regarded as a ground of reversal than such as appears *on the face* of the record and *immediately* respects the construction of the treaty, &c. in dispute.

If this be the true construction of the section, it will be wholly inadequate to the purposes which it professes to have in view, and be evaded at pleasure. But we see no reason for adopting this narrow construction. And there are the

strongest reasons against it founded upon the words as well as the intent of the Legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be, in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against *the title set up by the party*. It is therefore the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How indeed can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the Court can control the treaty in reference to that title. If the court below could decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty? Is not the treaty in both instances equally construed, and the title of the party in reference to the treaty equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction.

It requires that the error upon which the appellate court is to decide shall appear on the face of the record and *immediately respect* the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party; and every error that immediately respects that question, must of course be within the cognizance of the Court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question. Any error therefore in respect to that title must be re-examinable, or the case could never be presented to the Court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen that the parties might claim under various titles, and might assert various defences altogether independent of each other. The Court might admit or reject evidence applicable to one particular title and not to all. And in such cases, it was the intention of Congress to limit, what would otherwise have unquestionably attached to the Court the right of revising all the points involved in the cause. It therefore restrains the right to such errors as respect the question specified in the section. And in this view it has an appropriate sense, consistent with the preceding clauses. We are therefore satisfied, that upon principle, the case was rightfully before us;—and if the point were perfectly new we should not hesitate to assert the jurisdiction.

But the point has been already decided by this Court upon solemn argument. In *Smith* v. *the State of Maryland*, 6 *Cranch* 286, precisely the same objection was taken by counsel and overruled by the unanimous opinion of the Court. That case was in some respects stronger than the present, for the court below decided expressly that the party had no title, and therefore the treaty could not operate upon it. This Court entered into an examination of that question, and being of the same opinion affirmed the judgment. There cannot then be an authority which could more completely govern the present question.

It has been asserted at the bar that in point of fact the Court of Appeals did not decide either upon the treaty or the title apparent upon the record; but upon a compromise made under an act of the Legislature of Virginia. If it be (as we are informed) that this was a private act to take effect only upon a certain condition, viz. the execution of a deed of release of certain lands, which was matter *in pais*, it is somewhat difficult to understand how the Court could take judicial cognizance of the act or of the performance

of the condition, unless spread upon the record. At all events, we are bound to consider that the Court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice. And at the time of decision in the Court of Appeals and in this Court, another treaty had intervened which attached itself to the title in controversy, and of course must have been the supreme law to govern the decision, if it should be found applicable to the case. It was in this view that this Court did not deem it necessary to rest its former decision upon the treaty of peace, believing that the title of the defendant was at all events perfect under the treaty of 1794.

The remaining questions respect more the practice than the principles of this Court. The forms of process and the modes of proceeding in the exercise of jurisdiction are, with few exceptions, left by the Legislature to be regulated and changed as this Court may in its discretion deem expedient. By a rule of this Court, the return of a copy of a record of the proper court under the seal of that court, annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." The record in this case is duly certified by the clerk of the Court of Appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail.

Another objection is, that it does not appear that the Judge who granted the writ of error did, upon issuing the citation, take the bond required by the 22d section of the judiciary act.

We consider that provision as merely directory to the Judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this Court

can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record by which we can judicially know whether a bond has been taken or not. For the statute does not require the bond to be returned to this Court; and it might with equal propriety be lodged in the court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of law is, until the contrary appears, that every Judge who signs a citation has obeyed the injunctions of the act.

We have thus gone over all the principal questions in the cause, and we deliver our Judgment with entire confidence, that it is consistent with the Constitution and Laws of the land*.

It is the Opinion of the whole Court, that the Judgment of the Court of Appeals of Virginia, rendered on the Mandate in this Cause, be reversed, and the Judgment of the District Court held at Winchester be, and the same is hereby affirmed.

JOHNSON, J. It will be observed in this case, that the Court disavows all intention to decide on the right to issue a mandamus to the State Courts; thus leaving us, in my opinion, where the Constitution places us,—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

In this view, I acquiesce in their decision, but not altogether in the reasoning or opinion of my brother who deli-

* We have not thought it incumbent on us to give any opinion upon the question whether this Court have authority to issue a writ of mandamus to the Court of Appeals, to enforce the former Judgments, as we do not think it necessarily involved in the decision of the cause.

vered it. Few minds are accustomed to the same habit of thinking, and our conclusions are more satisfactory to ourselves when arrived at in our own way.

I have another reason for expressing my opinion on this occasion. I view this question as one of the most momentous importance; as one which may affect in its consequences the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union and one of the greatest states of the union, on a point the most delicate and difficult to be adjusted. On the one hand, the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man,—or the judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our Constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more.

On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained, consecrated, and intangible, that I could borrow the language of a celebrated orator, and exclaim—"I rejoice that Virginia has resisted."

Yet here I must claim the privilege of expressing my regret, that the opposition of the high and truly respected tribunal of that state, had not been marked with a little more moderation. The only point necessary to be decided

in the case then before them, was "*whether they were bound to obey the mandate emanating from this Court?*" But in the judgment entered on their minutes, they have affirmed that the case was in this court *coram non judice*, or in other words, that this court had not jurisdiction over it.

This is assuming a truly alarming latitude of judicial power. Where is it to extend? It is an acknowledged principle of I believe in every court in the world, that not only the decisions, but every thing done under the judicial process of courts not having jurisdiction, are *ipso facto*, void. Are then, the judgments of this court to be reviewed in every court of the Union? and is every recovery of money, every change of property, that has taken place under our proceess to be considered null, void, and tortious?

We pretend not to more infallibility than other courts, composed of the same frail materials which compose this. It would be the height of affectation to close our minds upon the recollection that we have been extracted from the same seminaries in which originated the learned men who preside over the state tribunals. But, there is one claim which we can with due confidence assert in our own name upon those tribunals. The profound, uniform, and unaffected respect which this court has always exhibited for state decisions, give us strong pretensions to judicial comity. And another claim I may assert, in the name of the American people. In this court, every state in the Union is represented. We are constituted by the voice of the Union. And when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of state tribunals. It is the nature of the human mind to press a favorite hypothesis too far. But magnanimity will always be ready to sacrifice the pride of opinion to public welfare.

In the case before us, the collision has been on our part wholly unsolicited. The exercise of this appellate jurisdiction over the state decisions has long been acquiesced in, and when the writ of error in this case was allowed by the President of the Court of Appeals of Virginia, we were sanctioned in supposing that we were to meet with the same acquiescence there. Had that court refused to grant the writ in the first instance, or had the question of jurisdiction or on the mode of exercising jurisdiction, been made there originally, we should have been put on our guard, and might have so modelled the process of this court as to strip it of the offensive form of a mandate. In this case it may have been brought over to what probably the 25th section of the jurisdiction act meant it should be, to wit, an alternative judgment either that the State Court may finally proceed, at its option, to carry into effect the judgment of this court; or if it declined doing so, that then this court would proceed itself to execute it. The words "sense" and "operation," of the 25th section on this subject, merit particular attention. In the preceding section, which has relation to the causes brought up by writ of error from the circuit courts of the United States, this court is instructed not to issue the executions, but to send a special mandate to the Circuit Court to award the execution thereupon. In case of the Circuit Court's refusal to obey such mandate, there could be no doubt, as to ulterior measures, compulsory measures might unquestionably be resorted to. Nor indeed was there any reason to suppose that they ever would refuse. And therefore there is no provision made for authorising this court to execute its own judgment in cases of that description. But not so in cases brought up from the state courts. The framers of that law plainly foresaw that the state courts may refuse; and not being willing to leave ground for the implication, that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorising this court, in case

of reversal of the state decision, to execute its own judgment. In case of *reversal* only, was this necessary; for in case of affirmance, this collision could not arise. It is true, that the words of this section are, that this court may, *in their discretion*, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this court to proceed indiscriminately in this way, as it could only be necessary in case of the refusal of the state courts. And this idea is fully confirmed by the words of the 13th section, which restrict this court in issuing the writ of mandamus, so as to confine it expressly to those courts which are constituted by the United States.

In this point of view the Legislature is completely vindicated from an intention to violate the independence of the state judiciaries. Nor can this court, with any more correctness, have imputed to it similar intentions. The form of the mandate issued in this case is that known to appellate tribunals, and used in the ordinary cases of writs of error from the courts of the United States. It will perhaps not be too much in such cases, to expect of those who are conversant in the forms, fictions, and technicality of the law, not to give to the process of courts too literal a construction. They should be considered with a view to the ends they are intended to answer, and the law and practice in which they originate. In this view, the mandate was no more than a mode of submitting to that court the option which the 25th section holds out to them.

Had the decision of the Court of Virginia been confined to the point of their legal obligation to carry the judgment of this court into effect, I should have thought it unnecessary to make any further observations in this cause. But we are called upon to vindicate our general revising power, and its due exercise in this particular case.

Here, that I may not be charged with arguing upon a hypothetical case, it is necessary to ascertain what the real question is which this court is now called to decide.

In doing this, it is necessary to do what, although in the abstract is of questionable propriety appears to be generally acquiesced in, to wit, to review the case as it originally came up to this court on the former writ of error. The cause then came upon a case stated between the parties, and under the practice of that state, having the effect of a special verdict. The case stated, brings into view the treaty of peace with Great Britain, and then proceeds to present the various laws of Virginia and the facts upon which the parties found their respective titles. It then presents no particular question, but refers generally to the law arising out of the case. The original decision was obtainted prior to the treaty of 1794, but before the case was adjudicated in this court the treaty of 1794 had been concluded.

The objection arises under the construction of the 25th section above mentioned; which, as far as it relates to this case, is in these words—"a final judgment or decree in any suit, in the highest court of law or equity of a state, in which a decision in the suit could be had," "where is drawn in question the construction of any clause of the Constitution or of a treaty," and the decision is against the title set up or claimed by either party under such clause, may be re-examined and reversed, and affirmed," &c.

"But no other error shall be assigned or regarded as a ground of reversal in such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said treaties," &c.

The first point to be decided under this state of the case was, that the judgment being a part of the record, if that judgment was not such, as upon that case it ought to have

been, it was an error apparent on the face of the record. But it was contended, that the case there stated, presented a number of points upon which the decision below may have been founded, and that it did not therefore necessarily appear to have been an error immediately respecting a question on the construction of a treaty. But the Court held, that as the reference was general to the law arising out of the case, if one question arose which called for the construction of a treaty, and the decision negatived the right set up under it, this court will reverse that decision; and that it is the duty of the party who would avoid the inconvenience of this principle, so to mould the case as to obviate the ambiguity. And under this point arises the question, whether this court can enquire into the title of the party, or whether they are so restricted in their judicial powers as to be confined to decide on the operation of a treaty upon a title previously ascertained to exist.

If there is any one point in the case, on which an opinion may be given with confidence, it is this. Whether we consider the letter of the statute, or the spirit, intent, or meaning of the Constitution and of the Legislature, as expressed in the 25th section, it is equally clear that the title is the primary object to which the attention of the Court is called in every such case. The words are—" and the decision be against *the title*" so set up, not against *the construction of the treaty* contended for by the party setting up the title. And how could it be otherwise? The title may exist notwithstanding the decision of the state courts to the contrary; and in that case, the party is entitled to the benefits intended to be secured to him by the treaty. The decision to his prejudice, may have been the result of those very errors, partialities, or defects in state jurisprudence, against which the Constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on

a mere hypothetical case,—to give a construction to a treaty, without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate. This difficulty was felt, and weighed, in the case of Smith and the State of Maryland, and the decision was founded upon the idea that this Court was not thus restricted.

But another difficulty presented itself. The treaty of 1794 had become the supreme law of the land, since the judgment rendered in the court below. The defendant, who was at that time an alien, had now become confirmed in his rights, under that treaty. This would have been no objection to the original judgment. Were we then at liberty to notice that treaty in rendering the judgment of this court? Having dissented from the opinion of the court below, on the question of title, this difficulty did not present itself in any way, in the view I then took of the case. But the majority of the Court determined that, as a public law, the treaty was a part of the law of every case depending in this court. That as such, it was not necessary that it should be spread upon the record; and that it was obligatory upon this court, in rendering judgment upon this writ of error, notwithstanding the original judgment may have been otherwise unimpeachable. And to this opinion I yielded my hearty assent. For it cannot be maintained that this court is bound to give a judgment unlawful at the time of entering it, in consideration that the same judgment would have been lawful at any prior time. What judgment can now be lawfully rendered between the parties? is the question to which the attention of the Court is called. And if the law which sanctioned the original judgment expire, pending an appeal, this court has repeatedly reversed the judgment below, although rendered whilst the law existed. So too, if plaintiff in error die, pending suit, and his land descend on an alien, it cannot be contended that this court

will maintain the suit in right of the judgment, in favour of his ancestor notwithstanding his present disability.

It must here be recollected, that this is an action of ejectment. If the term formerly declared upon expires, pending the action, the Court will permit the plaintiff to amend, by extending the term. Why? Because although the right may have been in him at the commencement of the suit, it has ceased before judgment, and without this amendment he would not have judgment. But suppose the suit were really instituted to obtain possession of a lease-hold, and the lease expire before judgment, would the Court permit the party to amend, in opposition to the right of the case? On the contrary, if the term formally declared on, were more extensive than the lease in which the legal title was founded, could they give judgment for more than facts? It must be recollected, that under this judgment a *writ of restitution* is the fruit of the law. This, in its very nature, has relation to, and must be founded upon a present existing right at the time of judgment. And whatever be the cause which takes this right away, the remedy must, in the reason and nature of things, fall with it.

When all these incidental points are disposed of, we find the question finally reduced to this—Does the judicial power of the United States extend to the revision of decisions of state courts, in cases arising under treaties? But, in order to generalize the question, and present it in the true form in which it shows itself in this case, we will enquire whether the Constitution sanctions the exercise of a revising power over the decisions of state tribunals, in those cases to which the judicial power of the United States extends?

And here, it appears to me, that the great difficulty is on the other side. The real doubt, whether the state tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends.

Some cession of judicial power is contemplated by the 3d article of the Constitution. That which is ceded can no longer to be retained. In one of the circuit courts of the United States, it has been decided (with what correctness I will not say) that the cession of a power to pass a uniform act of bankruptcy, although not acted on by the United States, deprives the States of the power of passing laws to that effect. With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the States could resume it if the United States should abolish the courts vested with that jurisdiction. Yet, it is blended with the other cases of the jurisdiction, in the 2d section of the 3d article, and ceded in the same words.

But it is contended, that the 2d section of the 3d article contains no expression of cession of jurisdiction. That it only vests a power in Congress to assume jurisdiction to the extent therein expressed. And under this head arose the discussion on the construction proper to be given to that article. On this part of the case I shall not pause long. The rules of construction, where the nature of the instrument is as certain, are familiar to every one. To me the Constitution appears, in every light of it, to be a contract which, in legal language, may be denominated tripartite. The parties are the People, the States, and the United States. It is returning in a circle to contend, that it professes to be the exclusive act of the people; for what have the people done but to form this compact? That the States are recognised as parties to it, is evident from various passages, and particularly that in which the United States guarantee to each state a republican form of government. The security and happiness of the whole was the object; and to prevent dissention and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive irritability of sovereign states, where their wills or interests clash, they placed themselves, with

regard to each other, on the footing of sovereigns upon the ocean; where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. But to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice, where the rights of others come in question, or the great interests of the whole may be affected by those feelings, partialities, or prejudices which they meant to put down forever.

Nor shall I enter into a minute discussion of the meaning of the language of this section. I have seldom found much good result from hypercritical severity in examining the distinct force of words. Language is essentially defective in precision. More so than those are aware of, who are not in the habit of subjecting it to philological analysis. In the case before us, for instance, a rigid construction might be made, which would annihilate the powers intended to be ceded. The words are—"shall extend to." But that which *extends to*, does not necessarily *include in*. So that the circle may enlarge until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word *shall* in this sentence, is the future sense, and has nothing imperative in it. The language of the framers of the Constitution is—"we are about forming a general government. When that government is formed, its powers shall extend," &c. I therefore, see nothing imperative in this clause; and it certainly would have been very unnecessary to use the word in that sense. For as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act. But the same result arises from using it in a future sense; and the Constitution everywhere assumes, as a postulate, that wherever power is given, it will be used, or, at least, used as far as the interest of the American people require it, if not from the natural proneness of

man to the exercise of power, at least from a sense of duty, and the obligation of an oath. Nor can I see any difference in the effect of the words used in this section, as to the scope of the jurisdiction of the United States' courts over the cases of the first and second description, comprised in that section. "Shall extend to controversies" appears to me as comprehensive in effect, as "shall extend to all cases." For if the judicial powers extend "to controversies between citizen and alien," &c. to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to *all controversies*.

But I will assume the construction as a sound one, that the cession of power to the general government, means no more than that they may assume the exercise of it whenever they think it advisable. It is clear that Congress have hitherto acted under that impression, and my own opinion is in favour of its correctness. But does it not then follow that the jurisdiction of the State Court, within the range ceded to the general government, is permitted and may be withdrawn whenever Congress think proper to do so? As it is a principle that every one may renounce a right introduced for his benefit, we will admit that they may constitutionally exercise jurisdiction in such cases. Yet surely the general power to withdraw the exercise of it, includes in it the right to molify, limit, and restrain that exercise. "This is my domain. Put not your foot upon it. If you do, you are subject to my laws. I have a right to exclude you altogether. I have then a right to prescribe the terms of your admission to a participation. As long as you conform to my laws, participate in peace. But I reserve to myself the right of judging how far your acts are conformable to my laws." Analogy then, to the ordinary exercise of sovereign authority would sustain the exercise of this controling or revising power.

But it is argued that a power to assume jurisdiction to the constitutional extent does not necessarily carry with it a right to exercise appellate power over the state tribunals.

This is a momentous question, and one on which I shall reserve myself uncommitted for each particular case as it shall occur. It is enough at present to have shown that Congress has not asserted and this court has not attempted to exercise that kind of authority *in personam* over the state courts which would place them in the relation of an inferior responsible body *independent of their own acquiescence.* And I have too much confidence in the state tribunals to believe that a case ever will occur in which it will be necessary for the general government to assume a controlling power over those tribunals. But is it difficult to suppose a case which will call loudly for some remedy or restraint? Suppose a foreign minister or an officer acting regularly under authority from the United States, seized to-day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred in other countries. The angry vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope for ever to escape their baneful influence. In the case supposed, there ought to be a power somewhere to restrain or punish, or the union must be dissolved. At present the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the state courts in criminal cases. On the contrary, the general government has in more than one instance exhibited their confidence by a wish to vest them with the execution of their own penal laws. And extreme, indeed, I flatter myself, must be the case in which the general government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their right to do so.

But we know that by the 3d article of the Constitution judicial power to a certain extent, is vested in the general government; and that by the same instrument power is given to pass all laws necessary to carry into effect the provisions of the Constitution. At present it is only necessary to vindicate the laws which they have passed affecting civil cases pending in state tribunals.

In legislating on this subject, Congress in the true spirit of the Constitution, have proposed to secure to every one the full benefit of the Constitution without forcing any one necessarily into the Courts of the United States. With this view, in one class of cases, they have not taken away absolutely from the state courts all the cases to which their judicial power extends, but left it to the plaintiff to bring his action there originally if he chose, or to the defendant to force the plaintiff into the courts of the United States, where they have jurisdiction, and the former has instituted his suit in the state courts. In this case they have not made it legal for the defendant to plead to the jurisdiction, the effect of which would be to put an end to the plaintiff's suit and oblige him, probably at great risk or expense, to institute a new action; but the act has given him a right to obtain an order for a removal on a petition to the state court, upon which the cause with all its existing advantages is transferred to the circuit court of the United States. This, I presume, can be subject to no objection. As the legislature has an unquestionable right to make the ground of removal a ground of plea to a jurisdiction, and the court must then do no more than it is now called upon to do, to wit, give an order or a judgment, or call it what we will, in favour of the defendant. And so far from asserting the inferiority of the state tribunal, this act is rather that of a superior, inasmuch as the circuit court of the United States becomes bound by that order to take jurisdiction of the case. This method, so much more unlikely to affect official delicacy, than that

which is resorted to in the other class of cases, might perhaps have been more happily applied to all the cases which the legislature thought it advisable to remove from the state courts. But the other class of cases, in which the present is included, was proposed to be provided for in a different manner. And here again, the Legislature of the Union evince their confidence in the state tribunals, for they do not attempt to give original cognizance to their own circuit courts of such cases, or to remove them by petition and order, but still believing that their decisions will be generally satisfactory, a writ of error is not given immediately, as a question within the United States shall occur, but only in case the decision shall finally in the court of the last resort be against the title set up under the constitution, treaty, &c.

In this act, I can see nothing which amounts to an assertion of the inferiority or dependance of the state tribunals. The presiding judge of the state court is himself authorised to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he think proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever the form) is in substance no more than a mode of compelling the opposite party to appear before this court and maintain the legality of his judgment obtained before. An exemplification of the record is the common property of every one who chuses to apply and pay for it, and thus the case and the parties are brought before us. And so far is the court itself from being brought under the revising power of this court, that nothing but the case as presented by the record and pleadings of the parties is considered, and the opinions of the court are never resorted to unless for the purpose of assisting this court in forming their own opinion.

The absolute necessity that there was for Congress to exercise something of a revising power over the cases and parties in the state courts, will appear from this consideration.

Suppose the whole extent of the judicial power of the United States vested in their own courts, yet such a provision would not answer all the ends of the Constitution, for two reasons.

1st. Although the plaintiff may in such case have the full benefit of the Constitution extended to him, yet the defendant would not: as the plaintiff might force him into the court of the state at his election.

2dly. Supposing it possible so to legislate as to give the courts of the United States original jurisdiction in all cases arising under the Constitution, laws, &c. in the words of the 2d section of 3d article, (a point on which I have some doubt and which in time, might perhaps render the *quo minus fiction* of Great Britain necessary,) yet a very large class of cases would remain unprovided for. Incidental questions would often arise, and as a court of competent jurisdiction in the principal case, must decide all such questions, whatever laws they arise under, endless might be the diversity of decisions throughout the Union upon the Constitution, treaties and laws of the United States; a subject on which the tranquility of the Union internally and externally may materially depend.

I should feel the more hesitation in adopting the opinions which I express in this case, were I not firmly convinced that they are practical and may be acted upon without compromiting the harmony of the Union, or bringing humility upon the state tribunals. God forbid that the judicial power in these states should ever, for a moment, even in its humblest departments, feel a doubt of its own independence.—

Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved by the knowledge that what we do is not final between the parties. And no sense of dependance can be felt from the knowledge that the parties, not the court, may be summoned before another tribunal. With this view, by means of laws avoiding judgments obtained in the state courts, in cases over which Congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others. Under a liberal extension of the writ of injunction, and the habeas corpus ad subjiciendum, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the same tribunals. A right which I repeat again, Congress has not asserted, nor has this Court asserted, nor does there appear any necessity for asserting.

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

MISCELLANEA.

AMERICAN JURISPRUDENCE.

Supposed to be written by Mr. Rush, Attorney-General of the United States.

(*Concluded from Page* 347.)

WE have been indulging in the foregoing train of reflections with a view to clear the way for the remaining and chief question. And that is, how the profession of the law here, does, in point of fact, compare with the profession in England? If the reflections collectively be at all just, they have already more than half afforded the answer and shown how safely we may go into the comparison. For there seem to be good reasons why, in this country, the profession should stand upon high ground.

If mind be the result of external stimuli forcing it into action, our Jurisprudence is surrounded by that which must provoke and improve its powers. There are reasons why it ought not to be expected of us to produce a Lord Byron or a Walter Scott, a Dugald Stewart, perhaps, or other men of like stamp with those who enrich the British press with such a copious and constant flow of profound or elegant literary and scientific productions. We are yet at some distance, though, we trust, at no very great distance from the age that can feed in any extent the merely classic mind into fullness and perfection. But we see no reasons at all why we may not breed Gibbses, and Garrows, and Saubeys, and

Lawrences, and breed them in abundance. If we have not gained that stage of our growth when the luxury of the arts and sciences goes hand in hand with all other luxuri s, we enjoy in a proud degree, to use an expression of the Edinburg Review, "the luxury of liberty;" and it is not irrational to suppose that those who officiate so largely at her altars should arrive at a perfection in their duty.

In throwing out a conjectural sentiment, and one not altogether hasty, we presume to think that the law mind, if we may so speak, of the United States, has, from adequate causes, forerun the general condition of literature, and already been accelerated and matured into as much force and discipline as it is likely to reach in any more distant period of the country's advancement. How it may be in medicine, and in divinity, we do not presume on th's occasion to intimate. If there be fit matter for reflection under these heads, it must be gone into in some separate disquisition. In painting, there might be room to say something, keeping to the walk of native genius at least. We pass to our proper subject. The profession of the law with us, then, seems to be absorbed by duties as numerous and commanding at this day, as it is probable that it can be at any more remote period of fuller population and greater riches. Those scenes of portentous convulsion which in their occasional visitations rouse the mind of a whole community into temporary and preternatural force, and which more frequently belong to a full than to a slender population, and to age than to youth, may indeed form exceptions. But we speak of the settled and ordinary course of things. As our lovely territory continues to be overspread with cultivated fields, and to glitter with the spires of villages and cities, we shall, to be sure, witness a corresponding increase in the professors of this science; but it does not appear to follow that their faculties will be tasked to a higher compass of exertion than the faculties of those who now flourish in the

walks of full occupation. There are, doubtless, more men in England at the present day who write well, than there were in the time of queen Anne or queen Elizabeth; but it will scarcely be said that they write better than those who were at the head of the list at either of those periods.

As to profound scholarship, as a Wakefield or a Porson might define the term, it is not to be looked for as an adjunct of the profession in any country. But, for those classical embellishments which are ancillary, and whose tincture lends its chastening without monopolizing, it is probable that they are as much its concomitants with us at the present as they will be at a more distant era, because as much so we incline to think, taking the profession upon a large scale, as can be made compatible at any time with its unrelaxing and intrinsic toil. The necessity of those preparatory studies which alone can form the taste, and lift up the mind to proper conceptions of eminence, cannot be too anxiously and too constantly impressed upon the youth who is destined for the bar. But when once he has plunged into the profession he will find that, to the precepts of Blackstone's Valedictory to his Muse, he must submit in the full spirit of obedience.

It may possibly be supposed, that the subdivision of the profession in England affords a cause for its greater eminence in a particular line, than in a country where this system is not known; and that here we are consequently thrown under a division into counsellors and attornies, but that which assigns to counsellors and advocates of high standing a distinct range of business in distinct courts. Upon this opinion we must be permitted to bestow a moment's examination, being, as we own we are, decided and zealous dissentients. We admit also that it constitutes the stress of the argument.

It is certainly true, as a general proposition, that as you subdivide labour you increase its excellence. *Ars longa, vita brevis*, is a remark that every schoolboy knows. But the proposition has its modifications, and it has its limits. Its truth runs into a greater extreme as to the hand, than it does as to the mind. It may well enough be conceived that a pin win will be better made for being divided into eighteen distinct operations. So that palaces, orreries, optical instruments, or steam frigates, may be made to exhibit a result of greater capability and perfection from the number of artizans employed in their construction. But he who should, as a general rule, infer from this, that a book will be better written because one man furnishes the ideas and another the words, might be in danger of falling into a strange mistake.

Under what limitations precisely the proposition must be brought, is not easy to say by any previous definition; but there are some general principles by following which we may in all probability be led to sound conclusions. The law is, in itself, one entire science. Its various departments are but so many smaller orbs moving within the one grand outline of a smaller one. They all harmonize with each other. They enlarge, they illustrate, they enrich each other. They are social handmaids flourishing and delighting in proximity. That, with the requisite diligence, life is not long enough to arrive at an acquaintance with them all, we can by no means admit. Still less that the knowledge of one will weaken the knowledge of another. Did not Sulpicius, who was so celebrated an orator, also find time to write out more than a hundred volumes of the law? In rendering homage to intellect let us rather wish to see its powers carried to the utmost practical verge, than compressed within the scantiest limits.

That the lawyer should not also be able to master the lore of the metaphysician, the chemist, and the astronomer, we freely admit. Falling without the grand periphery of his own circle, or touching it but incidentally, a *pro hac vice* knowledge must content him. But we will not so underrate the comprehensive and ductile attributes of the human understanding as to imagine, that he must necessarily be the greater criminal lawyer who never goes out of the old Bailey, the greater civilian who practices exclusively in the Courts of Admiralty, or the greater common lawyer who takes briefs only in the King's Bench. The structure of society there may render this necessary, or may render it profitable; but that it is likely to elevate the mind in the same degree to its highest efforts of successful skill, we do not think follows. It would be difficult to make us believe that Tully pleaded with less learning and with less eloquence for Archias and for Murena, because he happened at the same time to be an accomplished master in every branch of the Roman law. It is not the language which he himself beautifully holds in the latter oration. We do not think it very probable either, that the exclusive practitioner in doctors' commons would be ready to admit, that the world must set him down as a less accurate English scholar, if it so happened that he understood also the Greek and Latin and the French languages.

Let us suppose a Bishop to be an eloquent preacher and learned divine. We shall certainly conclude, that he has trimmed his lamp over the whole body of theological research rather than stored away in his memory, ambitiously tenacious of nothing, the tenets of the Church of England. It may be this that might enable him to quote in its order a little more promptly one of the thirty-nine articles; but it would be poor praise, and at best only rounding the head of the pin. So we imagine, that he would be likely to be much the most able commander in chief who was master of the

principles and movements of every branch of service, the artillery, the cavalry, and the infantry, and where necessary could direct each, than he who understood but one. The analogy holds in the law. Within its own limits, considering it one science, all the parts of which are intimately kindred, we think that one mind is competent to move; and that its movements will be the more vigorous and the more effective from the space not being cramped. We would not have the general an admiral. We would not have the lawyer a mathematician. We would not have the bishop a judge. This would be for each to transcend entirely his own proper boundaries. But as little would we have any one a prisoner in a single cell of his own castle. We are allowing to each the spacious range of all the apartments. We do not see how else they are to comprehend, upon any thing of a large scale, the plan of the edifice.

Endeavoring to divest ourselves, as far as possible, of the national feeling, we candidly think, that the English lawyers, taken in the bulk, bear upon them, in the comparison with our own, something of the stamp of this rigidly exclusive occupation of the faculties.

Open, at random, a volume of Burrow or of East, and then do the same with one of Dallas or Cranch. We declare, that, to us, there seems in the general discussions of the former, a certain stiffness. Nearly every thing appears to turn upon the memory. The argument is a statement, accurate if you you will, but scarcely any thing in most instances, beyond a naked statement of the cases decided upon the same point, nicely fixed off in chronological order. The work, shall we add, appears to wind up like that of the mechanic, who has been less deeply engaged in thinking than in keeping to the rules of the trade. In those of the latter, it strikes us that there is more freedom; more fullness; more learning poured out; more illustration borrowed from the whole science; more trials of the mind's strength

in the higher province of reasoning; and mixed with no dearth of authorities from the books, a more frequent mounting up to principles.

These are only opinions. We would by no means be understood as asserting them with any dogmatic confidence. The English have theirs upon all subjects and no doubt will upon this. There can be no harm in having and expressing ours. Those who do not think our way of accounting for them good, will not agree with us. It lately seemed strange, and to some inexplicable, that we should keep vanquishing their frigates, and their sloops of war, and their squadrons, with scarcely an exception, wherever we happened to find them. And yet so was the fact. Now, as their Jurisprudence has been as long and is as justly their boast as their navy, who knows, if we only could get impartial arbiters, but that this country of their own peopling might also be thought in danger of tearing from them some of the laurels of the law? We leave others to talk about the causes or effects of the war; and for ourselves have nothing more to do with its events than barely to try if we can draw from them some remote but possibly not imperceptible analogies to mix with our speculations. Humbly supposing that we have gone near towards surpassing them in the one line, we do not know that it ought wholly to shock belief, should any one be bold enough to dream of our falling into the same unexpected sort of sacrilege in another!

Single instances may start to the recollection. It may be asked, have we produced an Erskine, or can we point to such a speech as M'Intosh's defence of Peltier?

We reply, that it is each bar in its general character and entire body which must decide the question under review. There has never yet been any printed collection made of the speeches of our great advocates in state prosecutions, or in trials otherwise of great prominence. They have been per-

mitted to pass off as they were delivered, and the flowing strains or the impressive bursts by which they may have been elevated and adorned, too generally committed only to the fleeting evidences of cotemporaneous and traditional memory. The stenographer is not as yet a frequent attendant upon our courts. Were the liberty permitted us of going into a recapitulation of private names, we could gratify our public and personal feelings, by a list known to fame in most of the States, where none will agree to be provincial, but all must be rated, and have in fact like claims to be rated, as acting an equal and a leading part,—of names that unite what is lofty in understanding and in knowledge with virtues that ennoble the heart, and the train of qualities that make private life dignified and delightful. The States of an ancient Greece, says Gibbon, "were cast in that happy mixture of union and independence, and had that identity of language, religion, and manners, which rendered them the spectators and judges of each other's merit, and excited them to strive for pre-eminence in the career of glory." How applicable to confederated America.

At some names we could point, who, too, are decked with the trophies of eloquence. Nor should we be prepared to admit, that in the combination of what is profound with what is brilliant, in touches of fancy gilding the superstructure on foundations of logical strength, in tones bold, animated, and thrilling, in language copious, gorgeous, and pure, we could not make a further selection to meet the challenge held out by this towering, yet solitary champion of the British metropolis. Mr. Erskine, for more than twenty years, stood alone at the English bar. Nor had he ever had his prototype. Sunk into a peerage whose perishing honors to the body were derived from man, he seems to have put off, to speak with Burke, the splendors of an intellect conferred upon him by God. Mr. Brougham will probably be his successor. In adverting to such names, while

we pay them the tribute which their genius demands, we do it with much the more pleasure in confidently imagining that even should the first be thought to bear off the meed of pre-eminence, they afford corroboration to the general spirit and theory of our remarks. They both conspicuously illustrate the truth, that to shine from afar in the profession, something more is necessary than to be harnessed up, like a thill-horse, always to work in one way. That to a wider scope a wider fame belongs. Mr. Erskine's speeches give incontestible proofs of his acquaintance with the entire range of the laws, constitution, and judicial policy of his country, sometimes in one line, and sometimes in another. History, theology, literature, the arts, all are tributary to the strength or to the ornament of his efforts. His defence of Stockdale, of Paine, his prosecution of Williams, his speech for Captain Baillie, for Carnan, are, in themselves, sufficient samples of these characteristics.

Sir James M'Intosh's defence need be the subject of but a single observation. It deserves every praise; but it is not the proper praise of bar oratory. It is a highly elaborate and ornate performance, with knowledge and rhetoric and beauty meeting in lavish and chaste union; which it is difficult to read without conviction if without tears, and certainly not without gathering up some of the choicest reflections of history and jurisprudence, refined by ethics and wrought together with the most exquisite skill, to produce in artificial minds a favorable and sympathetic glow. But it is not the speech of the advocate trained and proficient in the habits of the bar. It would be classed more properly, in our apprehension of its merits, among the fine pieces of composition of writers or of statesmen. He was not, we believe, at the time of its delivery, nor has he been since, a lawyer much engaged in the business of courts. And we think we can scarcely be wrong in supposing it to be the

production of the closet, rather than the true offspring of the forum.

There is, indeed, at the present day in England a Judge, perhaps their first, of the volumes containing whose decisions it has been said in the British House of Commons, "that they were no less valuable to the classical reader than to the student of law, by perpetuating the style in which the Judgments of the Court were delivered,*" A man he is of dazzling mind. Born, we believe, a miller's son, he can talk of giving a *rusticum judicium*. Yet, surely, no Judge upon the face of the earth was ever farther from having rendered such a one. His intellect is so polished that it has been called transparent. Some of his pages are as if diamond sparks were on them. When he deals in wit, it is like a sunbeam and gone as quick. But so much the worse. We pity the suitor, or the poor Vice-Admiralty Judge, it may happen to hit. Abundant learning is also his. We must say of him, that if he wants qualities necessary to consummate the fame of a great Judge, he has others which perhaps no Judge ever possessed before, or in the same degree. It was said,

"How great an Ovid was in Murray lost!"

But the Judge we speak of is an Ariel. He holds a judicial wand. Touching the scales with it, they at once look even, no matter what preponderance an instant before. How can such a Judge be truly great? One day, in the midst of some of those beautiful little judicial aphorisms the web of which he can weave so fine, he declares "that *astutia* does not belong to a court." The next, "that humanity is but its second virtue, justice being forever the first." The third, that it is "monstrous to suppose, that because one nation falls into guilt, others are let loose from the morality

* Lord Henry Petty, speaking of Robinson's Reports.

of public law." But a frost comes on the fourth! Certain retaliating orders are laid upon his desk, that shrine which no foreign touch ought ever to pollute. Unlike an illustrious British Judge who has just returned from India, the pliant spirit bows obedience. Instead of the dignity of his mind upholding the independence of justice, its subtlety is enlisted to show that on her majestic form no violation was imprinted. In one breath admitting that the rescript of the throne was the rule of his decision, he strives in the next to hide the consciousness of judicial obeisance. In an argument where the utmost extenuation of thought is drawn out into corresponding exilities of expression, he labors with abortive, yet splendid ingenuity to show, that justic e and such rescripts must ever be in harmonious union. So spake not the Holts and the Hales! No doubt it is a keen, and an exquisite, and a supple mind. It can enchain its listeners. Leaving its strength, it can disport in its gambols; it can exhale its sweets. But is it, can it be, great? Where is the lofty port when it can thus bend? Acknowledging its confinement within royal orders, can it hold, in true keeping, the divine attribute it was sworn to cherish unsullied? It is impossible.

There graces the first seat of judicial magistracy in this country a man of another stamp, and exhibiting different aspects of excellence. Venerable and dignified, laborious and intuitive, common law, chancery law, and admiralty law, each make their demands upon his profound, his discriminating, and his well-stored mind. Universal in his attainments in legal science, prompt and patient, courteous and firm, he fills up, by a combination of rare endowments, the measure of his difficult, his extensive, and his responsible duties; responsible not to the dictates of an executive, but moving in a sphere of true independence, responsible to his conscience, to his country, and to his God. What a grand, and to a mind exalted and virtuous, what an awful sphere? How

independent, how responsible! Vain would it be for us to expect to do justice to the full-orbed merit with which he moves in it. Bred up in a state rich in great names, counting her Washingtons, her Jeffersons, her Madisons, he long sustained a career of the highest reputation at the bar.—Passing to the bench of the supreme court of the United States, he carried to its duties a mind matured by experience, and invigorated by long, daily, and successful toil. In the voluminous state of our jurisprudence, every portion of which is occasionally brought under view, and in the novelties of our political state, often does it happen that questions are brought before him where the path is untrodden, where neither the book case nor the record exist to guide, and where the elementary writer himself glimmers dimly. It is upon such occasions that he pierces what is dark, examines what is remote, separates what is entangled, and draws down analogies from the fountain of first principles. Seizing with a large grasp what few other minds at first see, he embodies his comprehensive and distinct conceptions in language not sarcastic, but suited to the gravity and to the solemnity of the temple around him; thus he is found always with masterly ability, and most frequently with conviction, to lay open and elucidate the difficult subject. If there be any applicable learning, to a mind so formed, so furnished, and so trained, it is reasonable to think that it will be at hand.—Where there is none, the fertile deductions of its own independent vigor and clearnesss stand in the place of learning, and will become learning to those who are to live after him. His country alternately a neutral and a belligerent, again and again is he called upon to expound the volume of national law, to explore its intricate passages, to mark its nicest limitations. Upon such occasions, as well as upon the entire body of commercial law so conspicuously in the last resort intermingled with his adjudications, his recorded opinions will best make known to the world the penetration of his views, the extent of his knowledge, and the solidity of

his judgment. They are a national treasure. Posterity will read in them as well the rule of conduct, as the monuments of a genius that would have done honour to any age or to any country. Such is the sketch we would attempt of the judicial character of the Chief Justice of our country. That country is on a swift wing to greatness and to glory. To the world at large, the early day of her jurisprudence may remain unknown until then. But then it will break into light, and his name, like the Fortescues and the Cokes of the early day of England, fill perhaps even a a wider region from the less local foundations upon which it will rest. Let the courts of England boast of Sir William Scott. Those of America will boast of John Marshall.

Having been wandering so long, it is high time we should bestow some words upon the work which stands prefixed to our remarks, and which formed the occasion that led to them. Whatever errors they may be thought to contain, we pronounce an unequivocal opinion in its favor. We regard it, in its line, as a valuable present to the profession and to the public. It treats of most of the questions that belong to a state of war upon the ocean, and although not so largely as works that handle them separately, may nevertheless, for what it purports to be, which is only a digest, be confidently and strongly recommended. Wherever the author has resorted to the independent powers of his own pen, which the plan of his work does not however frequently contemplate, he has plainly shown that it can do more whenever it will attempt more.

In regard to the doctrines which he is for maintaining, he takes the ground of the most eminent writers, and dwells upon the enlightened adjudications of the tribunals of his own country. He does not push the neutral right to the

extent of either Martens or Schlegel. Nor does he carry the belligerent claim, or the belligerent justification, to that pitch of rapacious rigour, which it assumes when such decrees as the orders in council are declared to be sanctioned by public law; a rigour which the sound reason of civilized mankind will ever condemn, and which the better reason of England herself in other days has also condemned.

The value of the work is greatly enhanced from its embodying an abstract of all the important decisions which took place in the Supreme Court of the United States during the late war, as well as those of an able Circuit Court in the northern district. The first supply, in some degree, a desideratum severely felt from the valuable reports of Judge Cranch having been so long and so inconveniently suspended. The second set forth the industry, the zeal, and the talents, of a Judge who seems to know no relaxation in his learned labours, and who daily becomes more and more an ornament of the American bench. Upon the whole, as Chesterfield has said that every man should at one period or other of his life aim at doing something worthy to be written, or at writing something worthy to be read, we think Mr. Wheaton has fairly complied with the latter part of the injunction. The style of his book has that simplicity which ought always to belong to subjects that are didactic. We will barely subjoin a slight regret, that, as to its paper and type, it does not wear exactly the appearance in which the gentleman just quoted would probably have been best pleased to see it dressed.

Washington City, September, 1815.

ADJUDGED CASES

IN THE

SUPREME COURT OF NORTH-CAROLINA,

AT JULY TERM, 1816*.

Haywood v. *Craven's Executors.*

John Craven, by his last will and testament, gave and bequeathed to *James Turner*, *Nathaniel Macon*, and *John Hall*, to the survivors of them and the executors of the survivor, immediately after his death, three of his slaves, viz. *Prince*, *Hannah*, and *Grizzy*, and their increase, *in trust*, to have them emancipated and set free by the laws of the State, in such manner and at such time, as they shall think fit. He also devised to his said executors the half of Lot No. 223 in trust for the use of *Hannah* and *Grizzy*, and a quarter of an acre of land in trust for the use of *Prince*. To his sister *Margeret Craven* he left his town house, during her life-time, and the residue of the lot not before disposed of, together with a plantation and thirty slaves, and whatever else was not given away by the will. After sundry bequests, he gives and bequeaths, after the death of his sister, to his executors, the survivor of them and the executor of the survivor, twenty nine slaves and their increase, *in trust*, to have them set free by the laws of the State, in such time and in such manner as they may think

* TAYLOR, C. J. gave no Opinion in many of the Cases decided at this Term, being prevented by indisposition in his family from attending the consultations.

proper--He gave also to his executors after the death of his sister, his plantation tools, and implements of agriculture, in trust for the use of such of the male slaves as were, at the date of the will, of the age of sixteen years or upwards, and for the females of all ages, to hold the same as naked trustees, for the use and benefit of the said negroes and their heirs for ever. The executors are empowered to bind out all the male negroes at sixteen years of age to different trades, until they attain the age of *twenty one*, when they are to be emancipated: he directs his executors to sell his house and lot in town after the death of his sister, on a credit of five years, and the interest to be collected annually and applied to the use of *Prince*, *Hannah*, and *Grizzy*. He also gives to his executors eight acres of land in trust for *Grizzy*, and directs them to sell his furniture, or if necessary, his stock for the payment of his debts; and in the event of his sister dying before him, requires his will to be carried into immediate execution; his slaves to be lawfully liberated as soon as his executors can find it convenient to do so.

The testator died and his sister *Margaret* was put into possession of the property, and by her last will and testament devised and bequeathed all her property to the complainants *Stephen* and *Dallas Haywood*; the former of whom, after the death of the testatrix, had the will proved, and was duly appointed administrator with the will annexed.—*Prince* and *Hannah* were emancipated by the County Court during the life time of *Margaret Craven*.—Grizzy died a slave.

The Bill prays that the defendants may be decreed trustees for the benefit of the complainants, and compelled to deliver unto them the land and slaves, and account for the profits.

To this Bill the executors demurred.

A. Henderson in support of the demurrer.

No trust can result for the benefit of the heir at law or next of kin of *John Craven*, for if the devise is to an improper use, the Court will direct it to be applied to a proper one.—1 *Salk* 162—1 *Coke*, *Porter's case*, 25.

The testator has signified most expressly his will that no benefit should devolve upon his heirs, beyond the provision he has made for them. The Court will substantially carry the will into execution, if it cannot be done literally, or in the form and manner directed by the testator. Where the substance of the will may be effectuated, the rule of this Court is to perform it *cy pres*.—2 *Vern*. 266.

It is a well settled rule in the British Court of Chancery that when a devise is to a superstitious use and made void by statute; or to a charity and made void by the statute of mortmain, then it shall belong to the heir at law or next of kin; but where it is in itself a charity, but the mode in which it is to be disposed of is such, that by law it cannot take effect, the officer of the crown is directed to specify the charitable manner in which it may be disposed of. *Ambler* 228. So where the charitable object is uncertain.—*Ibid*. 712. A sum of money was devised for such charity as testator had by writing appointed, and no such writing being to be found, the King appointed the charity.—1 *Vern* 224. When the testator has empowered other persons to dispose of his estate, the heir at law is disinherited, as much as if he had disposed of it himself, and there can then be no resulting trust.—2 *Atkyns* 562.

The Court will not decree in favour of the complainants unless such a course is clearly directed by law, for the trust being of the most humane and benevolent kind, is entitled to a construction of correspondent liberality. As the testator has sought for nothing to be done except in pursuance of the law, it is possible that the slaves may yet be emanci-

pated by the Legislature; or the executors may procure their liberation by sending them to some other State. They ought to be allowed full time to make every proper effort to obey the will of their testator, and the discretion of the Court cannot be more wisely exercised than in holding up the bill till this is done.

Browne and *Gaston* for the complainants.

A Court of Equity puts the same construction upon *trusts* that a Court of Law does upon legal estates.—2 *Burr.* 1108. 9. It must follow the law and cannot adopt different rules for the transmission of estates.—2 *Vesey, jr.* 426. Where a case is sent to a Court of law for their opinion, it must be stripped of all appearance of trust, otherwise that court will not answer.—4 *Vesey, jr.* 788.

Were this case so sent, it must be stated as a devise to *Margaret Craven* for life, and after her death, these slaves to themselves, and all the rest of the testator's property to them too. But in every gift there must be a *donor*, a *donee*, and a *thing* given.—*Plow.* 563. The donee must have capacity to take or hold.—*C. Lit.* 2, 6. Where he has neither, the conveyance, of whatever sort it may be, is absolutely void. An alien may purchase lands but he cannot hold; by the civil law he can do neither, and a conveyance to him is void.—1 *Bl.* 371. It makes no difference whether the incapacity is created by the common law or by statute. The property must remain in the donor or devolve upon his heir at law or next of kin, whether the attempt to tranfer it is made at law, or by way of trust or will.—3 *Atkyns* 806. 2 *Vesey, jr.* 482. If then there is no person, who by the will, can take, the heir at law does; and trustees who are to have no profit cannot even present to a living.—2 *Vesey, jr.* 282.

A slave is considered in law as a chattel and not as a person. He cannot maintain an action; he passes under a

bequest of personal estate, and is levied upon and sold under a *fieri facias* to take the goods and chattels. To kill him wilfully and maliciously was only a trespass.—*Act* 1741, c. 24. It was declared to be murder by 1791, c. 4, and ousted of clergy 1801, c. 21. Even if the master sets him free, he shall be treated as a slave—1741, c. 21. The holding of property for him, whether by trust or otherwise, is illegal.—*Conf. Rep.* 353.

By the common law, a monk professed can neither take nor hold—*C. Litt.* 36. He is considered as having once existed, but not as now existing except for special purposes. The case of property given or limited to a monk professed is exactly in point, only not so strong. An immediate estate given to a monk is void—*Plow.* 35. So of a devise—1 *Str.* 337. 2 *Roll.* 415.

If a devisee is incapable of taking when the estate ought to vest, the devise is void.—*Plow.* 345. *Cro. Eliz.* 422. 9 *Mod.* 167, 181. 1 *Str.* 369. 1 *Salk.* 227. In the case of a descent, a person not in *esse* may take when he comes in *esse*; but in the case of a purchase it is forever gone—1 *Str.* 378. The legislatures has not said that a devisee may take without being in *esse*, at the time the estate ought to vest; but it has been said, and the Courts have held, that a child in *ventre sa mere*, shall be considered as in *esse*, and therefore may take as a purchaser. This decides the question as to all the negroes who had not been set free and enabled to take at the death of *Margaret Craven*, when the property ought to have vested in possession. But it may be said in reply, that this depends upon the rule of law that the freehold shall not be in abeyance, but that the inheritance may; and that although an immediate devise to a person incapable of taking shall be void, yet a remainder shall be good, if the person was capable of taking when the particular estate is determined, as *Prince*, and the others who were emancipated, were in the present case. This i true to a

certain extent; but the remainder man must be in *esse* or in *potentia propinqua*.—*Noy* 123. *Plow.* 27. 2 *Co.* 51.—Here the devise of the negroes and lands are plain perpetuities; to the trustees it is in fee without the power of alienation. The trust is of the negroes and their increase until they are set free, which may not happen in 57 years, is equally so. The executors themselves are the persons who may set these negroes free—the county court only grants a license to do so. But while the executors hold this property, no one can call them to account; so that as they are bare trustees and cannot sell, it will remain in their hands as long as they please, unalienable. If such a trust is valid, it must be equally so when created by deed, and no doubt, it would become a common way of forming perpetuities. It cannot be imagined that the County Court would grant a license to set those negroes free; for it can only be done for meritorious services. But some of them are very young, and many in contemplation, not yet born. It is equally improbable that the Legislature would do so contrary to the rule they have laid down for the Courts. To carry this trust into effect then, what is it but setting all these slaves free contrary to law? It is evident that the executors were not intended to be benefited by the labour of the slaves or the cultivation of the land; but the slaves themselves were to have the whole. Now the devise of the whole profits of a thing, is both in law and equity a devise of the thing itself.

The cases on charitable uses bear no analogy to the case before the Court. The objects to which such devises may be applied are enumerated in the statute 43 *Eliz.* and are all consistent with the policy and welfare of the country. But the object of this devise, so far from being compatible with the national policy, is absolutely forbidden by a variety of statutes.—*Acts* 1741, 1777, 1779, 1788.

The rule applicable to this case is that wherever a conveyance is made on particular trusts, which by accident or otherwise cannot take effect, a trust will result.—3 *P. Wms.* 20, 252.—1 *Bro. Ch. Rep.* 508.

A. Henderson and *Murphey* in reply. The cases relied upon to show that there must be a donee capable of taking, relate to an immediate gift by deed. But the principle is different where trustees are appointed by will, who take for the benefit of the donee, and hold till his capacity arises. Thus in *Porter's* case 1 *Co.* The trustees held the land for the benefit of a corporation not then created. And if the contingency of emancipation is too remote, why was not the devise in the same case held void? for there two acts were to be done,—an act of incorporation to be procured, and a license to hold land obtained. Yet it was considered not to be too remote. There are cases where a charity was never created, yet the Court would not take the estate from the trustees against the intention of the testator.

In 1 *Bro. Ch. C.* there was a devise for a Bishoprick in America, which it was contended there was no probability of being established, yet the Chancellor held the money in Court, and would not allow the executors to have it, and the money was held in Court for 60 years. In 2 *Bro. Ch. C.* 498, a demise was held up until a license to hold in mortmain could be obtained. The case in *Ambler* 571 is a devise in trust for a charity not in *esse*; and before the trust could be executed it was necessary to obtain a license to purchase ground in mortmain, and also a charter of incorporation; yet the devise was supported. The contingency in this case must happen within the period established for executing devises, viz. a life or lives in being and 21 years afterwards, for the slaves to be benefited by it are all named in the will. When the question is as to the remoteness of an event, it is proper to consider the nature of the property bequeathed—

2 *Fearne* 369. All the doctrine relative to this part of the case is fully discussed in 2 *Call* 319.

The cases cited to prove that a trust results to the heir where the devise cannot take effect from accident, confine the rule to those instances in which the accident is such as renders it impossible to execute the will of the testator, as the death of the devisee or legatee, &c.; or to those where lands are devised for a particular purpose, that which remains after the purpose is satisfied results.

It is not denied that trusts have the same construction with legal estates in Courts of Equity, but this position is too broadly laid down on the other side, and to be rightly understood, it must be received with some qualification. The intervention of trustees will not convert an estate for life into an estate of inheritance; it will not enable the testator to create a perpetuity, nor will it change the properties and incidents of an estate. The rule in its general bearing is confined, however, to trusts executed and not executory. In the latter sort a difference of construction is allowed in order to effectuate the intent of the testator. *Cases Temp. Tal.* 19.

PER CURIAM*.

As those members of the Court, who alone can decide in this case, have no doubt on the subject, and both parties seem anxious to avoid further delay, we see no reason to postpone the judgment; although it would have been more consonant to the respect with which we have listened to the able arguments on the part of the defendant, to have stated particularly wherein they have seemed to us inconclusive, and failed to produce conviction in our minds. But this could only

* SEAWELL, CAMERON, and HALL, J. gave no opinion in this case, the two former having been consulted while at the bar; the latter being one of the executors of Mr. *Craven*. The cause was decided by TAYLOR, C. J. LOWRIE and DANIEL, J.

be done by the delay of a term, as we have ascertained the general principles on which we do agree a few minutes only before coming into Court, and as this is the last day of the term, we must give the opinion in general terms or not at all.

We are of opinion, that the trust attempted to be created by the will of *Mr. Craven* is void in law, not only as contrary to its general policy, but as repugnant to positive provisions by statute; for the law has pointed out one method only in which slaves can be liberated, act of 1741, c. 24, and the principle on which it is permitted, can by no construction be applied to the case before us The same act directs the slaves to be sold if the owner sets them free in any other manner. With respect to the cases decided upon the 43. *Eliz.* it is believed that not one can be found in which a Court of Equity has executed a charitable purpose, unless the will so described it, that the law will acknowledge it to be such. The disposition must be to such purposes as are enumerated in the statute, or to others bearing an analogy to them, and such as a court of chancery in the ordinary exercise of its power, has been in the habit of enforcing. But wherever the intention is to create a trust which cannot be disposed of to charitable purposes, and is too indefinite to be disposed of to any other purposes, the property remains undisposed of, and reverts to the heir at law or next of kin, according to its nature. This is the construction of courts of equity, even upon charitable dispositions.—10 *Vesey jr.* 552. But for the reasons already stated, we do not perceive any resemblance between them and this case. It must therefore be governed by the general rule, and as the trustees have no interest, they must be considered as holding the property for the benefit of those on whom the law casts the legal estate.

Demurrer overruled.

Cutler v. *Blackman.*

This ejectment was tried before DANIEL, J. at Sampson Superior Court, where the following case was diclosed by the testimony.

The plaintiff produced a grant to James Spiller from the State, dated in the month of October, in the year 1787, and deduced title regularly from the grantee. Neither the grantee, nor any person under him, has ever had any actual possession of the premises in dispute. The defendant claims under one Marley, to whom a grant issued from the State in November, 1805, in pursuance of a sale made by the commissioner of confiscated property, who had sold the land described in the declaration as the property of one Thomas Christie, of Ireland, whose property in the state had been confiscated by the act of 1779, c. 2. The defendant alledged that the land in question had been granted by the said Christie at a very early period of the settlement of this county by the Lords Proprietors. It was admitted by plaintiff's council that diligent search had been made by defendants and that no grant to said Christie, and that the copy of no grant could be found. The defendant and those under whom he claims have been in actual possession of the land in question ever since the grant issued to the said Marley in 1805. The defendent then offered in evidence the following circumstances to show that the land had been granted to the said Christie. The witness proved that about forty-eight years ago he was called on as a surveyor by one McDonald, who called himself the agent of Christie, to survey a large tract of land including the premises in question. He saw no grant, and no paper was exhibited to him by the said agent except a plat which was of the size and shape of those which were formerly attached to old grants, but smaller than the plats which were usually attached to grants that issued about the time that he was requested to make

the survey. There was no seal on the plat. And he does not recollect whether there was any hole through the plat by which it might have been attached to a grant. That he ran the lines agreeably to the plat, and found the two first lines plainly marked all the way and three corner trees;—one of the corner trees was short of the distance mentioned in the plat; the corner trees and all the line trees were uniform in appearance, and bore the marks of great age. On the third and fourth lines he found no marked trees; but he stated, it was usual at the time this land must have been surveyed from the age of the marked trees, for the first and second lines only to be marked, and for the plats to be made out without running the third and fourth lines.

The plat above spoken of represented the tract as square. One of the lines would have answered for a line of a large tract granted to Richard Dobbs. He does not know that the other marked line would have answered as the line of any adjoining tract, but the three corner trees designated the land delineated in the plat. He did not know that any grant had ever issued to Christie for the land. He had never seen one or heard that one had issued. Neither Christie nor any person under him ever had actual possession of the land in dispute. Christie resided in Ireland, and he does not know nor did he ever hear that Christie ever owned any other land in this State. The witness was called on to survey this large tract, because several persons were in actual possession of parts of it; four or five persons were assembled to accompany the surveyor and protect him from the threatened attacks of those who were in possession. The lands represented in the plat and which he ran, were called in the neighborhood and generally understood to be Christie's lands. The persons in possession disputed that Christie had title; and if he had title, their possession gave *them* title. The act of 1779, c. 2, confiscsted all the property of Thomas Christie in this State. The infancy of the lessor

of the plaintiff in this case has prevented the operation of the statute of limitation. From these circumstances the jury presumed that a grant had issued for the land in dispute to Christie, and found the defendant not guilty of the trespass and ejectment laid in the declaration. Plaintiff moved for a new trial. First, on the ground that no grant can be presumed where there has been no possession of the premises. And second, if a grant can be presumed where there has not been possession, these facts are not sufficient to warrant the verdict of the jury.

Motion overruled by the Court, and a new trial refused. Appeal.

Browne, for the plaintiff.

There is no case to be found where a grant has ever been presumed without possession.—*Gilb. S. E.* 27, 28.—*Peake* 22, 110, 301, 2. Nor ought such a presumption to be made here, even with possession, so readily as it is in England; because all grants must be registered; and this was required so early as by the great deed of grant. It is observable that one of the evils complained of in the act of 1715, c. 33, § 6, is, that person's pretended title to large tracts of land, upon a bare entry or survey.

Shaw for the defendant.

Possession of lands according to the books always means an actual possession, and refers to a state of things where the land is generally occupied. But necessity has enacted and usage sanctioned a different notion of possession in this State; and a constructive possession is equivalent to an actual one. If then, other circumstances are equal, may not a grant be presumed from such possession?

Browne was about to reply but was stopped by the Court.

Cameron, J. delivered the opinion of the Court.

It is a very clear rule of law that the existence of a grant cannot be presumed, unless the party claiming the benefit of such presumption proves the actual possession of the land. No such possession having been proved here, the verdict must be set aside and a new trial granted.

Hendricks v. *Mendenhall.*

The premises in the plaintiff's declaration mentioned, are parcel of a tract of 150 acres of land, granted by the State of North Carolina to one Patrick Boggan, on the 19th of October 1783. The same 150 acres were conveyed by said Boggan to one Thomas Wade, sen. on the 23d October 1784. The premises in the plaintiff's declaration mentioned, were by said Thomas Wade, sen. conveyed to his son George Wade, by deed of gift, on the 26th August 1786. Thomas Wade, sen. died before George Wade, leaving the said George Wade, Thomas Wade, jun. and Holden Wade, his only sons and heirs at law. George Wade died unmarried before the year 1790, leaving the said Thomas Wade, jun. and Holden Wade, his only brethren and heirs at law. Mary Henrdricks, wife of James S Hendricks and Sally Wade (they all being lessors of plaintiff) are the only heirs at law of said Holden Wade, who is also deceased, and the defendant, William Mendenhall, is in possession of lots No. 7 and 19, in the plaintiff's declaration mentioned.

Thomas Wade, sen. before his death made a will which was duly proven, whereby, among other things, the said Thomas Wade, jun. the said Holden Wade, and three other persons, were appointed executors thereof with authority to

them generally to sell and dispose of the testator's real property for the payment of his the testator's debts. Said Thomas Wade, jun. and Holden Wade undertook the execution of said will, and were the only acting executors thereof. After the death of the said Thomas Wade, sen. in the year —, a judgment was obtained by one Eveleigh against the said Thomas Wade, jun. and Holden Wade, as executors of said Thomas Wade, sen. in the County Court of Anson county, of the term of , of the same year, for the sum of . Said judgment was however taken by confession, without the finding or acknowledgment of any plea in favour of said executors upon said judgment. No *scire facias* issued to the heirs of said Thomas Wade, sen. to show cause why execution should not issue upon said judgment against the lands of said Thomas Wade, sen. then descended in their hands. A writ of *scire facias* upon said judgment nevertheless did issue, returnable in said County Court to the term of July in the year 1790; by virtue of which a levy and sale regularly took place of a variety of lands. In pursuance of the sale so made, one William May, then sheriff of said county of Anson, made and executed a deed to the purchasers. At the same day and place of making said sheriff's deed, the said Thomas Wade, jun. and Holden Wade, on the back of said sheriff's deed, made, executed, and delivered, under their respective hands and seals, an instrument of writing in the following words, viz.

"To all to whom these presents shall come. Know ye, that we, Holden Wade and Thomas Wade, as well for ourselves as the other executors and executrix of Thomas Wade deceased, do hereby agree to and confirm the within deed, made and executed by William May, sheriff of Anson county, for the intent and meaning therein specified, by virtue of the power vested in us by the last will of T. Wade, deceased. In witness whereof, we have hereunto set our

hands and seals the day and date of the within presents." Signed by Holden and Thomas Wade, as acting executors of T. Wade, deceased.

The tract of 150 acres, first before mentioned, is the same tract of 150 acres which is mentioned and described in the said deed of William May. The same 150 acres were conveyed by the purchasers at the said sheriff's sale to one Joshua Prout, on the 28th June 1798. On the 19th July 1809, said Joshua Prout conveyed lots No. 7 and 19, parcel of the said 150 acres and also parcel of the premises in the plaintiff's declaration mentioned, to one George Wade (uncle to the George Wade before named and brother of Thomas Wade, sen.) On the 21st January 1811, said George Wade who purchased of Prout, conveyed said lots, No. 7 and 19, to one John Coleman, who on the 9th day of May 1812, conveyed the same lots No. 7 and 19, to the defendant William Mendenhall.

M'Millan, for the defendant, contended, that the endorsement on the deed amounted to an estoppel as to those who signed it, and all claiming under them; and cited *Cro. Eliz.* 362. 2 *Cro.* 756, 769.

A. Henderson, for the plaintiff.

The executors had no design to estop themselves of their own property, but only of that which they held in their representative character. It was in this character they endorsed the deed, and not as heirs at law. Any other construction would be to make a contract for the parties. Besides, there was nothing on which the estoppel could operate; for the sheriff's deed was void, because there was no *scire facias* against the heirs, and no verdict on the plea of *plene admin.*

The cases cited are of person acting in their proper capacity. But it is different when they act in a representative character.—*Comyn's Dig. Tit. Estoppel. Letter C.*

SEAWELL, J. We are called upon in this case to say whether the plaintiffs have made out a legal title to the premises in question? and it is admitted they have, unless Holden, their father, parted with it in his lifetime. The only act done by him was an endorsement upon a sheriff's deed, in which the premises were conveyed by the sheriff to a purchaser under an execution, which by the statement appears unsupported by any judgment. The sheriff therefore, had no authority to sell. By this endorsement the father declare that in *virtue of the authority* derived from the will of his testator, he confirms the sale. These if not the words, are at least their substance. Now it may be laid down as the general doctrine in relation to the execution of powers, that it is not necessary to recite that the act is done in *virtue* of the power; but that it is sufficient execution if it can be done *only* in virtue of the power; for though the *form* of executing may not suggest the execution of a power, yet the *purpose* of the act done, can only be explained by resorting to the power: and the maxim is, that it is immaterial whether the intention be collected from the *words* used or the *acts* done. *Quia non refert au quis intentionem suam declaret, verbis, au rebus ipsis vel factis.* And on the other hand, it is equally clear, as this *intention* is to guide and give efficacy to the act, that where a party has both power and interest, and he does not act *purporting* to be in virtue of his interest, that he shall be held to intend *that*, and not to exercise his power.—Sir *Edward Cleaves's* case and 10 *Vesey, jr.* 346, present Lord Chancellor in the case of *Maundrell*, 2 *Maundrell.*—And this therefore at once disposes of all that has been said upon the subject of estoppel. For if the endorsement only professed to be in execution of a power, the party making it can only be concluded from denying any

of the *facts* affirmed by him; and if it should be suggested that it may operate as the confirmation, the answer has already been given, that the endorsment *excludes* the idea of the exercise of any personal dominion. And indeed it is essential to the operation of every confirmation, that there should be some *estate*, though voidable, for it to act upon; the maxim there being, *confirmatio est nulla, ubi donum precedens est invalidum*, it may make a *voidable* estate good, but can give no effect to one that is *void.—Co. Lit.* title *Confirmation.*

The sheriff could convey by his *deed* nothing but what old Wade had, and he having nothing, the deed was void. Whatever title is claimed, from the effect of the endorsement, is at last referrible to the testator's will. The executors as trustees are only as instruments to effectuate the devise. The father of the plaintiffs has therefore done nothing which, in *law*, has passed his interest, and whether he ought in justice and equity to be restrained from asserting it, must be referred to those courts, to whom the jurisprudence of our country has confided the power of deciding. It may turn out that the father was guilty of a fraud; or it may be the case, he acted under a mistake. If the former, he would be compelled to convey. If the latter, it would be unjust he should lose his land.

TAYLOR, C. J. The land sued for in this action was no part of the estate of Thomas Wade, sen. at the time of the judgment against his executors. He had conveyed it in his lifetime to George Wade, upon whose death it descended to his brothers Holden and Thomas Wade. The recital in the sheriff's deed, therefore, that Thomas Wade, sen. was seised in fee of that tract when the execution was levied, is not founded in fact. But it is contended by the defendant that this land being sold by the sheriff, and his sale confirmed by the executors, their heirs are now

estopped to claim it. But I am of opinion that this would be to give a forced interpretation to their endorsement on the deed. For from the very terms of it, they profess to act only in pursuance of the power given to them by the will of their father, viz. to sell and dispose of *his* lands for the payment of *his* debts. And it seems an unlikely circumstance that they should intend to confirm the sale of a tract of land belonging to themselves, for the same purpose, when it was not derived by descent from the father. It is possible that in a sale of so many tracts, not less than eight or nine, comprehended in the same deed, they might not have distinguished this one, which certainly the sheriff had no right to sell. Nor do I think that the cases relied upon prove that the plaintiffs are estopped to claim.—They proceed on the common principle that a tenant shall not deny the title of his landlord. But the question here is, whether persons acting in the character of executors, and with an express reference to the power conferred by the will, shall convey lands not belonging to the testator? I think the deed is not so to be understood, for Lord Coke says that every estoppel must be certain to every intent, and not taken by argument or inference;—that it ought to have a precise affirmation of that which maketh the estoppel.—*1 Co. Lit.* 352. *b.*

Judgment for the plaintiff.

Littlejohn v. *Underhill's Executor.*

This is an action of debt upon an obligation given by the testator in his lifetime. The defendant pleaded 'payment and set off, prior judgments, judgments confessed, no assets, no assets ultra, retainer, plene administravit in all its forms;' on which pleas issue was joined. The jury

now find a verdict for the plaintiff, on all the issues, subject to the opinion of the Court on the following case.

The plaintiff's writ was executed on the defendant on the 2d January 1815, returnable to Chowan County Court on the second Monday of March ensuing. The defendant sold all the property of his testator on the 17th January 1815, at six months' credit. At March Term, to wit, on the 17th of March 1815, the defendant entered the foregoing pleas. The defendant, on the trial, introduced satisfactory evidence under the plea of 'retainer,' and for the payment of the funeral charges and his own commissions, with the disbursement of all the assets with which he was charged, except the sum of $ 704 60; and as to that sum, he offered the following evidence. First, as to $ 100 of it,—that among his testator's negroes was one by the name of Sarah, so old and infirm as to be incapable of labour; and that he had set her up to be provided for during the remainder of her life, to the lowest bidder; that the sum of $ 100 was the lowest bid; and that accordingly he had paid that sum for this purpose. And as to $ 604 60 he offered in evidence a number of judgments on warrants brought on specialties before a justice, which were taken between the 21st of January and the 17th of March 1815, and were paid by him previous to the issues being joined in the suit, and which judgments were of the following tenor, to wit, "judgment in favour of the plaintiff for the sum of . Thomas Brownrigg the executor, present, pleads 'plene administravit in all its forms, no assets, judgments, bonds, notes, retainer, and no assets ultra, suits on bonds and notes." The pleas are admitted, and signed by the justice.

In some of these warrants the magistrate had given judgment for thirty pounds, the amount of the specialty, together with interest according to specialty, previously accrued thereon; and the whole judgment thus exceeding

thirty pounds. The amount of the excess of interest, which upon the warrants collectively, is $ 28 40, has been paid by the executor. It is submitted to the Court to determine if the preceding questions are decided in favour of the defendant, whether these judgments should be allowed the defendant, as proper vouchers for the whole amount, or for any part? And it is agreed, upon this statement of the case, to be submitted to the Court to decide whether the defendant was justified in paying the above mentioned sum of money for such purposes, in preference to the plaintiff's demand. And judgment is to be entered up according to the opinion of the Court, for such sum as they shall direct.

Browne, for the plaintiff.

The plaintiff's writ was executed January 2d, 1815. All the estate was sold January 17th, 1815.

All the estate being in his hands when the writ was executed, was *assets* to satisfy the plaintiff's claim.—1 *Law Rep.* 99. *Ib.* March 1715, 120.

Unless he can show that he *retains* it for the purpose of satisfying a prior claim of a third person, or an equal one of his own; or that, before pleading, he *paid* on compulsion, or voluntarily before notice.—1 *Off. Ex.* 145.

The utmost that has ever been allowed, is for the administrator to *confess* assets to an equal claim, and then plead that confession.—*Doug.* [452]. *Waters* v. *Miel's Administartors.*

These assets had not been confessed to the judgments offered in evidence, nor had they any lien on these assets; for they were, *quando acciderent.*

The act of 1803, c. 1, gives to justices of the peace jurisdiction of "all demands of thirty pounds and under, for a balance due on any specialty contract," &c.

Here, it *appears*, that some of the judgments were given in cases where there was *above* thirty pounds due on the specialty; which was assuming a jurisdiction not given by the act of Assembly, and the judgment was absolutely void, and of no more force than if given by any other individual. *Com. Dig. Courts P.* 15.

Therefore, being no judgment, the payment cannot be justified as the payment of a judgment; and as the payment of a specialty it cannot be justified; for the bringing of our suit had so attached the assets as to prevent the defendant from disposing of them unless by confessing them to a suit. 1 *Off Ex.* 145. *Doug.* [452]. *Waters* v. *Meil's Admin.*

As to the $ 100. If it is said that he was bound to support the negro, I answer that he was bound *as administrator*. And as administrator, he was bound to pay our debt. To pay simple *contract debts;* but that would be no answer to a specialty creditor, who had given notice. To pay legacies; but that would not defeat a creditor who had paid in time. To pay the rent of leased premises; but if he had no assets and did not enter, he would be excused.

Besides, the duty of maintenance was only to become due from time to time. And even among equal claims the administrator is bound to pay that which *is* due, in preference.—1 *Off. Ex'or.* 143.

The rent due at testator's death is a debt. That which becomes due afterwards is not.—*Ib.* 146, 7.

Nash, for the defendant.

There can be no difference between one judgment absolute, and one rendered *quando*, with respect to the question now before the Court. For if we were not protected by the letter, we must pay both plaintiffs without having assets to do so, and without mispleading. We do not set up a vo-

luntary payment against the plaintiff's writ, but judgments which we had no power to resist. As to the judgments, the magistrate had jurisdiction. The warrants show this.—And even if the judgments might be reversed for error, they are nevertheless a bar as long as they remain in force. The true inquiry is, not whether judgments so obtained are erroneous, but whether they are fraudulent;—and of this there is no suggestion.—1 *Stra.* 410.

With respect to the support of the negro, we think it sanctioned by the act of 1798, c. 13.

PER CURIAM.

The principal question in this case depends upon, whether the judgments obtained after the service of the writ and *before* plea, be of such a nature, as hold the executor responsible for the assets he had when served with the writ? and if these judgments had been, that the plaintiff *then have* execution, and *not quando*, it seems admitted they would, provided they are not void in law. As to the *nature* of the judgments, according to the *circumstances* of this case, we think that can make no difference; because it was true, when they were rendered, that the effects previously sold on the six months' credit, were not assets;—the act of Assembly having only made the executor accountable for them, in a reasonable time after the proceeds were due. Whenever, therefore, they *should* come, or *might* be obtained, they then would be assets, and the executor accountable to the judgment creditors for them. If, therefore, he was accountable to them, it is clear he ought not to be accountable to the plaintiff; for it has been properly admitted, that the priority of suit only ties the hands of the executor against a *voluntary* payment.

Then, as to the exception which has been taken to the judgments because they exceed thirty pounds. And we think, as the warrants did not exceed thirty pounds, that

the Justice, therefore, had *jurisdiction*, and his judgment therefore, was not *void*, but only *voidable*.

The only remaining question is as to the $ 100 paid for the support of the disabled slave? and that we think must depend upon the nature of the transaction. If with a fraudulent design, upon being so *found*, would be unavailing. But if fair and honest, that it is good. For we consider this as a kind of *charge* upon the estate in favour of the *community*, which in case of a deficiency of assets, is entitled to a preference against the claims of *individuals*.— Wherefore, we are all of opinion there should be judgment for the defendant.

Collins v. *Underhill's Executor.*

This is an action of the same nature as the foregoing. The writ was executed at the same time, returned to the same court, the pleas the same as in that case and entered at the same time; but that case stood first on the docket. And now at this term, after the trial of that case and judgment for the plaintiff, the defendant moved for leave to plead that judgment as a plea since the last continuance, in discharge of the assets *pro tanto* in this case. And it is agreed to be referred to the Supreme Court to decide whether this plea shall be admitted. And it is further agreed, that in other respects, this case shall be governed by the decision of the Supreme Court, in the foregoing case of *Littlejohn* v. *Underhill's Executor*.

Browne, for the plaintiff.

I believe the plea of *plene administravit* will not be received when it delays the plaintiff.

A plea of judgments recovered since the plea will not be admitted.—2 *Hayw.* 155.

And if admitted, not good.—*Conf. Rep.* 555.

By administering, the defendant got the advantage of retaining that which he hath lost by misconducting his business.

PER CURIAM.

The Judgment cannot be pleaded in the manner proposed.

Williams v. *Collins.*

Assumpsit on the following letter written by the defendant, and addressed to the plaintiffs.

SIR,——The bearer hereof, Mr. Henry Fleury, informs me, that he is about bargaining with you for the purchase of a new vessel and a cargo for her, also for a quantity of Indian corn. In case you and he should agree, I will guarantee any contract he may enter into with you for the same or any part thereof, and am,

Sir, very respectfully,
Your obedient servant.
JOSIAH COLLINS.

Edenton, Nov. 2, 1808.

The material facts in the case were, that in consequence of the above letter, the contract was made, and the vessel and cargo delivered to Fleury, who was to pay for them in three several instalments; for which he executed three notes,—one payable 1st January 1805, one on the 15th June 1805, and one on the 15th June 1806. These notes being unpaid, Williams instituted suit against Fleury, on the 17th August

1807, returnable to September term of the same year. A verdict was found for the plaintiff at March term 1808, and an execution issued from that term which was returned at June term 'nothing to be found;' an *alias* issued which was returned at September in the same manner.

The writ in this suit issued the 9th October 1808, returnable to November of the same year, at Martin Superior Court.

On the 15th January 1807, Fleury mortgaged to creditors in New-York, property which was sold on the 19th December 1809, for £1283 7.

Fleury became entitled to property under the will of Vallett, which was found in December 1806, to the amount of £345. Fleury and Collins both lived in Edenton.

Henderson and *Nash* for the plaintiff.

The contract is, that the defendant will guarantee *any* contract which Fleury may enter into with the plaintiff. The defendant is therefore bound to the full extent that Fleury himself would have been. There is no analogy between a bill of exchange and a guaranty. In the latter, no notice is necessary. In *Peil* and *others* v. *Tatlock*, three years had elapsed before any notice was given; yet the plaintiff recovered—1 *Bos. & Pull.* 419. In *Eddowes* v. *Neil*, there was a lapse of nineteen years without notice.—4 *Dallas* 133. All the cases go to establish, that the guaranty, binds indefinitely; and that he who gives it is bound to take notice of the circumstances of the debtor, and to do the first act.—1 *Binny* 195. 8 *East* 243. 3 *Cranch* 490.

Browne, for the defendant.

Where a creditor has a right to look to two in succession, he is obliged to use due diligence against the first. This applies to all cases whatever, whether the liability has arisen from the endorsement of a bill of exchange, or from any

other cause. With this difference, perhaps, that in the first case, the law merchant requires more vigilant diligence on account of the sudden changes of fortune to which mercantile men are liable.

The endorser of a note is only a warranty thereof, that the drawer will pay it, and if he does not, that the indorser will.—1 *Wils.* 48.

There is the same undertaking, or guaranty, on an unnegotiable instrument and due diligence, although perhaps not so strictly, is there also required.—2 *Wils.* 353.

The law is precisely the same with regard to a letter of guaranty. The writer only warrants the solvency of the person in whose favour he writes; and if a loss happens owing to the want of diligence of the person written to, he must bear it.—8 *East* 242. If the warrantee *might* have saved himself and did not, he can have no recourse on the warrantor. Justice and equity require, that the person benefited by the transaction should be first applied to, to pay for that benefit. And wherever the law makes it the duty of a man to do any thing, it requires of him due diligence in doing it.

Fleury remained absent for two years after the first note became due; one year and seven months after the second; and seven months after the last became due; and the plaintiff took no step to recover the money from him until one year and two months after the last note had become due. Nor did he give the defendant any notice whatever, that the notes, or either of them, had not been paid. Surely, no one can pretend that the plaintiff used due diligence, or that the loss arising from Fleury's insolvency was not owing to his neglect.

Of the cases cited for the plaintiff, that of *Peil & als.* v. *Tatlock*, admits the doctrine contended for on behalf of the

defendant. But the Court thought "there was no want of communication with the defendant." They further thought that no loss had been sustained, which could by any means have been avoided. The case in 4 *Dallas* 133, also admits the doctrine. But the Court thought that, considering the war, the situation of the parties, and the other circumstances of the case, due diligence had been used.

In the case cited from 1 *Binney* 195, the writer of the letter of guaranty promised to be *accountable with* the person in whose favour it was written. And the question now before the Court was never raised in that case. What weight will be allowed to the decisions of a Court where a cause can be discussed at great length and decided without even once glancing at the principal question arising from the facts, is not for me to say.

Nash, in reply, entered into a particular examination and analysis of the cases before cited for the plaintiff, for the purpose of showing that the law relative to bills of exchange was in no respect applicable to letters of guaranty. As to the case cited for the defendant from 1 *Wils.* it was on a promissory note endorsed; and of course, subject to the rules which govern bills of exchange. The case from 2 *Wils.* was where the drawer of the order had effects in the hands of the drawee, and a demand and notice were consequently indispensable. The plaintiff here was under no obligation to concern himself about Fleury's circumstances, who was not contracted with on his own credit, but on Collins's. The latter, therefore, should have observed the transactions of Fleury, and apprised the plaintiff of any probable loss. Not having done so, he must be supposed to have approved of the moderate forbearance exercised by the plaintiff. It is a part of the case, that Collins and Fleury resided in the same town; the plaintiff lived in Martin county.

SEAWELL, J. delivered the opinion of a majority of the Court:

The present action is brought for a breach of defendant's agreement, to which the defendant has pleaded, the 'general issue and act of limitation.' The agreement which the plaintiff exhibits is a letter written by the defendant to the plaintiff, in which the defendant states, that he will guarantee any contract which one Fleury may make with the plaintiff for a vessel and cargo, or any part thereof. Fleury makes a contract for the vessel and cargo, payable in instalments, the last of which was within three years of the commencement of the present action. And the defence relied upon is, that Fleury was *able* to have complied with his own engagement if the plaintiff had used due diligence, but that he is now, and has been for some time, insolvent; and that the loss should be borne by the plaintiff, who might by proper vigilance have obtained payment from Fleury.

In the opinion of a majority of the Court, the case is completely stripped of all difficulty by examining what was the nature and extent of the guaranty. It was not, as seems to be supported by the argument, that Fleury should be *able* to comply with any contract he might make; but that he *should* comply. The defendant, therefore, to all legal consequences, became pledged, *absolutely* to the same extent that Fleury was bound, as soon as the plaintiff parted with his property; for it is apparent, from the terms in which the letter is written, that it was the defendant who was principally relied on. And as to the failure of Fleury, that was an event which it was incumbent on the defendant to guard against; and it behoved *him*, to hasten the plaintiff, or make such other provision for his own safety as Fleury's circumstances would afford. But as to the plaintiff, he had from the *beginning* provided against that, by requiring some other person to be bound to him, who should be able to make good the contract of Fleury, though Fleury himself might

fail. That the extent of the defendant's liability, as to every consequence in law, was the same as if he had himself signed the obligations which Fleury executed to the plaintiff; and that if his situation as a surety, or *warrantor* was to avail him any thing, *he* must himself entertain and *express* an anxiety that suit should be brought against Fleury, otherwise the plaintiff need not; for indeed the fact may be, that the plaintiff considered the defendant and Fleury equally interested in the purchase, as a joint concern. As to the act of limitation, that is out of the question. The plaintiff could maintain but one action upon the agreement, and to have the full benefit of it, he must wait till the last failure of Fleury. Upon the whole, we think there is not the least analogy between this case and those which were cited for defendant.

The guaranty made by an endorser is a *conditional* one, this an absolute one. The guaranty that the purchaser of cotton should be indemnified upon a resale, can only be understood to mean an engagement that the price of the article shall be such, that if the purchaser *chooses*, he may have an opportunity of saving himself. The engagement in the present case to be analogous to those, must be, that defendant guaranteed Fleury should be *able* to comply with his engagement. He has however thought proper to warrant that he *should* comply, and, consequently, as Fleury has failed, the defendant is bound to perform his own; and therefore there must be judgment for the plaintiff.

Taylor, C. J. I formerly considered this case upon the whole statement, and made up an opinion when it was usual for the Court to pronounce upon the record as sent up, without distinguishing, as we now do, between questions of law and those cases which contain only evidence or facts exclusively belonging to a jury. From the view I have taken of the case, it does not appear to me within our jurisdiction; as it presents only the question, whether the debt has been

lost by the want of diligence in the plaintiff; and though this is sometimes called in the books a mixed question of law and fact, and more frequently a question of law, yet I believe that the practice of this State has, with much uniformity, treated it as a question of fact to be decided by the jury. My brothers think that the character of this contract excludes the question, and that the defendant is bound to make good Fleury's engagement, to the same extent as if he had signed the notes himself. I am of opinion that there is a distinction founded in justice and recognized by law, between an original debtor and a surety or guarantee; and that whenever a contract is shown in Court, which upon the face of it, exhibits the defendant in the character of a surety, certain principles immediately apply to it; one of which imposes on the creditor the duty of showing that nothing has been done on his part tending to exonerate the principal and burthen the security.

Upon a joint and several bond, although one of the parties may in truth be a surety, yet in a court of law both are principals, because there is no way of getting at the transaction. But take the same case into a court of equity, and a difference will be made between the principal and surety; for if it can be shown that any act has been done by the obligee that may injure the surety, the Court will lay hold of it in favour of the surety.—4 *Vesey, jr.* 824. 2 *Bro. Ch. Ca.* 578. 2 *Vesey, jr.* 540.

In the case before us, the true nature of the relation between the defendant and the plaintiff is shown by the letter; and if upon the question being submitted to a jury, they should be of opinion that the plaintiff might have recovered his debt from him who was benefited by the contract, and that the loss was occasioned by the plaintiff's want of diligence, I should think he ought to bear it. For, to use the language of Lord Loughborough, in a case depending on the same principles, "it is a breach of the obligation in con-

science and honesty, and it is not too much to say of that objection in point of law."—*Nesbit* v. *Smith*. 2 *Bro. Ch. Ca.* 578. By a guaranty I understand a contract of indemnity which binds the party who gives it, only in default in him for whose benefit it is given. And from the nature of such a contract it results, that the debtor must be resorted to in the first instance.

In respect to the degree of diligence, that must depend on the circumstances of each case; and though I am not disposed to think that the strict rules relative to bills of exchange are applicable to this case, yet I am persuaded that the justice on which such rules are founded ought to have a correspondent effect wherever a man is sued for a debt for which he was not originally liable. The plaintiff in this case has considered the contract in the same light; for he has received part payment from Fleury, and prosecuted a suit for the residue.

Blount v. *Blount*.

This is an action of trespass *quare clausum fregit*, in which the jury found a verdict for the plaintiff subject to the opinion of the Court on the following point, to wit, whether a deed regularly executed, proved, and registered from Levi Blount, under whom the plaintiffs claim as heirs at law,—(which deed expresses that "the said Levi Blount, as well for and in consideration of the natural love and affection which he hath for and beareth unto the said Judith Whidbie, his natural born daughter, as also for the better maintenance and preferment of the said Judith Whidbie, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said Judith Whidbie, her heirs, and assigns for ever, the land in dispute,")—is suffi-

cient to convey the said Blount's title to the said Judith Whidbie, under whom the defendant claims.

Hogg, for the plaintiff, cited 3 *Cruise*, title *Deed. C. Lit.* 123, *a. Comyn's Dig.* title *Covenant. c.* 5.

TAYLOR, C. J. delivered the opinion of the Court.

The question arising upon this record is, whether the deed relied upon by the defendant, is sufficient in law to convey the title from Levi Blount? The distinction between a deed and a parol contract is well settled at common law, and upon the basis of sense and justice. The inconsiderate manner in which words frequently pass from men, would often betray them into acts of imprudence, and not unfrequently, expose them to the artifices of fraud, were they not placed under the safeguard of that rule, which denies validity to a parol contract, unsupported by a consideration. On the other hand, the ceremonies which accompany a deed imply reflection and care; and serve to enable a man to avoid either surprise or imposition.

This rule was changed only when Chancery assumed a jurisdiction of uses, when they acted upon the maxim of the civil law, *ex nudo pecto non oritur actio*, and would not carry a deed into execution which was not supported by a consideration.

Lord Bacon, in his reading on the statute of uses, remarks, "they say that a use is but a nimble and light thing and now contrariwise it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed, nor by deed enrolled without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed or sufficiently passed by law; but if money have

been paid and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chanc ry."

Of common law conveyances it is necessary to notice only a feoffment, and it is very clear that this deed cannot operate as such. Because the case does not state that Levi Blount was in possession, nor that he gave livery of seisin; and if the deed were in all other respects formally in feoffment, the mere signing and sealing such a deed was, in no instance, sufficient to transfer an estate of freehold, unless the p ssession was deliv red from the feoffor to the feoffee, and without which a deed of feoffment only passed an estate at will.—1 *Co. Lit.* 43 *a.* The livery of seisin is the delivery of actual possession; and therefore cannot be made by a person who has not at the moment actual possession. Consequently, if a person make a feoffment of lands which are let at lease, he must obtain the assent of the lessee to the livery. The old practice was for the lessee to give up the possession for a moment to the lessor, in order to enable him to give the livery.—*Betterworth's* case, 2 *Rep.* 31.

It is next to be enquired whether the deed can operate under the statute of uses, the effect of which is to impart efficacy to certain conveyances without a transmutation of possession.

A bargain and sale is a contract by which a person conveys his land to another for a pecuniary consideration; whence a use arises to the bargainee, and the statute immediately transfers the legal estate and possession to him without any entry or other act on his part.

For want of a pecuniary consideration then, it is perfectly clear that this deed cannot operate as a bargain and sale.

Nor can it operate as a covenent to stand seised to uses, because it is essential to this sort of conveyance, that the consideration be either affection to a near relation or mar-

riage. The love and affection which a man is supposed to bear to his brothers and sisters, nephews and nieces, and heirs at law, as well as the natural desire of preserving his name and family, all form good considerations.

There is an implied obligation subsisting between parent and children, who are considered in equity as creditors, claiming a debt, arising from the duty a parent is under to provide for them.

But love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seised.

Where a person covenanted in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to A, his reputed son, (who was illegitimate) for life, &c. and also covenanted to levy a fine or make a feoffment for further assurance. Afterwards he made a feoffment in fee to the covenantees, in performance of his covenant to the same uses. It was resolved that no use arose to A, the bastard, by the covenant, for want of a consideration. Nor could he take any thing by the feoffment, it being only made for further assurance.—*Dyer* 364, pl. 16.

This case is expressly in point, and its authority is unquestionable; wherefore, there must be Judgment for the plaintiff.

Hilliard v. *Moore.*

"Robert Hilliard departed this life intestate, some time prior to the year 1790, seised and possessed of a tract of land, lying in the county of Northampton, in fee-simple. The said Robert left three daughters, his only children and heirs at law; to whom the aforesaid tract of land descended.

The land was divided; and the part which fell to Martha is the land in dispute.

"The lessors of the plaintiff are the other two children of Robert Hilliard the ancestor. Martha, one of the daughters, intermarried with Norfleet Harris, some time in the year 1790, and on the 25th December 1792, he by deed, conveyed the land in dispute to Willam Bridgers, under whom the defendant claims. Martha, the wife of Norfleet Harris, was no party to that deed. Norfleet Harris had issue by his wife Martha, a son, Robert Hilliard Harris, the only issue of that marriage. Martha, the wife of Norfleet Harris, died some time in the year 1793. Norfleet Harris married a second wife and had issue by her Elizabeth and Richard, who are living. Then Robert H. Harris the son, died some time in the year 1799, under age, intestestate, and without issue. Norfleet Harris, the father, died on the 22d October 1807.

"The question submitted to the Supreme Court is, who are the heirs at law of the deceased son, Robert H. Harris? Are his half brother and sister on the part of his father? Is the father? Or, are the plaintiffs, who are the aunts of the intestate son on the maternal side of the whole blood? If the latter, then Judgment to be entered for the plaintiffs for the land in the declaration. If otherwise, then Judgment for the defendant."

SEAWELL, J. delivered the opinion of the Court:

The question in this case is, whether the aunt of the whole blood, on the side of the mother, from whom the lands were derived by descent, shall take in exclusion of a brother of the half blood on the side of the father? And this will depend upon the effect of the acts of 1784.

We will however premise, that this is the first case that has ever occurred in which the action was decided solely up-

on this point. For in the case of *Shepperd* and *Reef* two of the judges who decided for the defendant founded their opinion upon a title which they supposed the half blood acquired from the common mother; two other judges were of opinion that the half blood could not take; and the remaining two were of opinion that the mother had title. A majority, therefore, being of opinion that the defendant had title, though they differed as to the mode by which he acquired it, the defendant was necessarily entitled to judgment. For we are free to declare, that had the decision of the cause been upon this point, the length of time which has elapsed, and the effect the decision might have produced upon landed titles, and the decision being of the highest Court known to our law, we should have felt ourselves bound by it, though at variance with our own opinion. But as that question still remains to be decided, and this case embraces it, we must perform our duty without any regard to what may have been the general understanding, or what particular inconvenience it may produce to individuals. We will proceed now to an examination of the question.

Previous to the act of 1784, all the rules of the common law in relation to descents, were in full force in this State; and it is quite certain, that under those rules the half blood could in no case inherit. Whatever, therefore, the Legislature of this country have done in regulating descents of real estate, so far operates as a repeal of the common law; and from this view it will result, that the rules of the common law still continue in every particular but in those cases in which they have been altered. That the Legislature themselves considered it so, must be apparent from their noticing in the preamble of the act of October 1784, that it was necessary to amend the third section of the preceding act in order to let in the brothers of the half blood; for what but the common law could keep them out? The first

act of 1784 does, as was contended by the counsel for the half blood, profess to regulate descents of real estates; and if the act had gone no further than the 3d section without any proviso, there could have been no room for the present question; and it may be wondered, if they meant no more, why they should have superadded the subsequent clauses. The act then would have had the effect of placing the half blood upon the same footing as the whole blood. In other words, would have abolished the distinction. But it is a sound rule, and of very ancient date, that in construing acts of Parliament, the meaning of the Legislature, in a particular part of an act, is to be ascertained by all they have said upon the same subject; for it will rarely happen that the act as it finally passed, has undergone no alteration as to the *extent* of the design of the Legislature from the time it was introduced, and this reasoning therefore applies with peculiar force to the operation of a proviso.

To this 3rd section a proviso is added, that when an intestate shall have half blood on father's side, and half blood on mother's side, that the half blood on the side from which the land descended shall exclude the other. Now it might be asked, if the half blood brother of the line of the first purchaser is permitted to exclude the brother who is not of that line; and this for no other reason than on the score of blood, can the brother of the whole blood be supposed not to do so? And yet this will result from the construction contended for.

In the 7th section of the same act, the Legislature declares, that in case of the death of a child, intestate and without issue, or brother or sister, a dying *with* either of which had already been provided for, the estate should vest in the parent from whom *derived*; and in case of a puchase, it should vest in the father; but if he should be dead, then in the mother and her heirs; and if the mother be dead, then the heirs of the father; and in *default* thereof, the heirs of the mo-

ther. And the Legislature in the same year made an alteration in this section, declaring, that by accident the descent may be altered and the paternal excluded, which in all other instances is most favoured; from the proviso therefore of the 3rd section, from the 7th section of the same act, paying respect to the ancestor from whom the estate descended, and from the amendatory or explanatory act of October 1784, stating that the paternal line in *all instances* is most favoured, and assigning that as the motive for making the amendment, it is clear that it was not the intention of the Legislature in all cases to put the half blood upon an equality with the whole blood; for though in the first section of the act of October 1784, there are some general expressions that it was the intention of the Legislature to let in the half blood equally with the whole blood, yet from the preamble it is plain that they were only guarding against a critical construction of the 3rd section of the act of April 1784, which possibly might only let in the sisters of the half blood; and the only effect of this clause is to make brothers of the half blood capable of inheriting as well as sisters of the half blood.

If then, this be the proper construction of this clause, we have abundant reason to believe that the Legislature had not *entirely* lost sight of the principles of the common law in looking for the heirs in that stock from whom the land had been derived. That they narrowed down the principle, it is true, and would not permit one stock to exclude another upon a feigned presumption; for in cases of actual purchase, as the lands had not been derived through any channel by inheritance, they have permitted the half blood to share equally with the whole blood, provided they are of that line most *favoured by law*; for we see that in a case of actual purchase they do not lose sight of this principle, for they declare, that in case of a death without issue, brother or sister, that the paternal line shall be, as in *all other instances*, *most favoured* and exclude the maternal.

To us, therefore, it appears that the general terms of the 3rd section of the first act, have been so cut down and controlled, as well by the proviso as by the 7th section and the amendatory act of October 1784, and the first clause of that act having no other object than to place *brothers* of the half blood upon the footing of *sisters* of the half blood; that in a case of a person dying intestate, none can claim to inherit the lands which the intestate acquired by descent but those who are of the blood of the ancestor from whom derived, and that therefore there must be judgment for the plaintiff.

Daniel, J. was of counsel in this cause, and therefore gave no opinion, but expressed himself to be of the same opinion.

Executor of Henry v. *Ballard and Slade.*

The jury find that Perry Fulsher, seised of the premises in fee, on the 2d of April 1796, executed the instrument of writing (a copy of which is annexed to this case); that at the time the said instrument was about to be written, the said Fulsher asked, whether it was better to make a *will* or deed? and upon being told 'a deed,' directed the paper referred to, to be written, and accordingly executed the same. The jury further find, that Reading Squires *paid no* consideration to Fulsher, nor was he related to him by blood, otherwise than being the illegitimate son of Fulsher's wife; that Squires conveyed the lands mentioned in the said paper writing referred to, to the plaintiff, and that defendants entered upon the plaintiff's possession; and if the law from these facts be for the plaintiff, they find for him and assess his damages to six pence; if otherwise, for the defendant.

In the progress of this cause, it was first objected to the admissibility of the probate of the paper referred to, as a will, upon the ground that the certificate did not state that

it was *proven* to have been attested by two witnesses in presence of testator. The evidence was received without prejudice to the exception. The defendant then offered the two living subscribing witnesses to prove the circumstances which attended the execution of the paper writing, as are found in the special verdict of the jury. This evidence was objected to, but admitted without prejudice to the plaintiff. The other witness who proved it as a will was dead. The special verdict, together with the several exceptions to the evidence, are transmitted to the Supreme Court for their determination. The paper writing referred to, together with the certificate of probate, is also made part of the case.

North-Carolina, Beaufort County.

Know ye all men by these presents to whom it shall come greeting, I, the said Peregrine Fulsher of the said county and province aforesaid, being weak in body and health, do ordain this to be my last deed of gift. In the first place, I want all my just debts to be paid, and funeral charges, and to be buried in a Christian-like manner. In the first place, I give to my son-in-law, Reading Squires, 350 acres of land, to him and his lawful begotten heirs of his body, after the decease of me and my wife Tamar Fulsher. In the next place, I do give to my son-in-law, Reading Squires, all the property I own and shall own during my natural life, clear of all wills, legacies, or any thing that shall come against the said Peregrine Fulsher's estate, or any incumbrances whatsoever.

Given under my hand and seal, this 2d day of April, in the year of our Lord 1796.

his
PEREGRINE ⋈ FULSHER, (L. S.)
mark.

Test of us,

his
William ⋈ *Riggs*
mark.

her
Susannah ⋈ *Riggs*
mark.

Samuel Harrison.

State of North-Carolina, Craven County.

Court of Pleas and Quarter Sessions, September Term, A. D. 1811.

The last will and testament of Peregrine Fulsher was produced, and the execution thereof by the testator was proved in open court, and in due form of law, by the oath of Samuel Harrison, one of the subscribing witnesses thereto, who swore that he saw the said Peregrine sign and seal, and heard the said testator declare said instrument to be and contain his true and only last will and testament; and the said Samuel Harrison further swore, that at the time thereof the said testator was of a sound and disposing mind and memory. Whereupon, ordered, that said will be recorded.

Badger, for the defendant, argued that the paper writing exhibited could only operate as a deed, which was the instrument intended to be made.—*Pow. on Dev.* 13. *Cruise Devise* c. 5, § 26. 2dly, That if it operated as a will, the certificate of probate was not admissible evidence, because it does not state that it was signed by two witnesses in the testator's presence.—*Acts* 1784, c. 22, § 11.

It is not sufficient that the certificate states that the will was found in due form of law; for that is to be judged of by the Court when a title is set up under it. A probate being *ex parte* is not conclusive.—4 *Johns.* 162.

Gaston, for the plaintiff, cited the act of 1784, ses. 2, c. 10, § 6, which makes the probates sufficient testimony for the devise of real estates.

PER CURIAM.

It is not necessary to decide in this case upon the nature and effect of a probate when offered in evidence, because the Judge who tried the cause informs us that in point of fact the wintesses introduced by the defendant did prove the execution of the will in the manner required by law; and in this respect we consider the statement as amended by the Judge. On the other question, we are of opinion that this

instrument of writing was made with a view to the disposition of the estate after the death of Fulsher, and although it is called a deed in the body of it, and the testator was advised to make a deed, yet the whole structure and operation of it shows it to be a testamentary paper.

Judgment for the plaintiff.

Norwood v. *Branch and others.*

John Branch, being seised and possessed of a large real and personal estate, devised the same amongst his children, with the exception of his daughter Patience, as to the real estate, but to whom he bequeathed more than a full proportion of his personal property. Upon several of his children also he had made settlements in his life time of lands to a considerable value, but none upon his daughter Patience. John Branch died without making any disposition of a certain tract of land of 789 acres. Several of his children, to whom he had devised and given land died, leaving children; all of whom were parties to this petition, the object of which was to compel the children of John Branch and his grandchildren, whose fathers had been advanced, to bring into hotchpot the lands respectively settled, provided they claimed a share with Patience of the tract of land of which John Branch died intestate.

The case was argued by *Norwood*, for the plaintiff, and *Browne*, for the defendant.

Taylor, C. J. delivered the opinion of the Court:

This case depends entirely upon the just construction of the act of 1784 regulating descents, and the act of 1795 admitting females to the inheritance; the great object of

which laws is to make the estates of the children entitled to the inheritance, as nearly equal as possible. It is to descend to all the children, share and share alike, except such sons or daughters as have had lands settled on them by their deceased parents, equal to the share descending to the other children. If the share so settled, be not equal to the part descending, it is to be made so out of that. The term employed by the law is, 'settle,' and this applies as significantly to a devise as to a deed. The opposite construction drawn from the English statute of distribution, has been in consequence of the peculiar wording of the act, which has the word 'lifetime,' and has been thought to signify such a provision as is made in the intestate's lifetime, and not by will—2 *P. Wm.* 441, though the decisions have not been uniform in this.—9 *Vesey*, 413. We are therefore of opinion, that the children of John Branch, upon whom lands have been settled by him, either by deed or devise, and his grandchildren upon whose parents similar settlements have been made, must bring into hotchpot all such lands, provided they claim to share with Patience or the petitioner who purchased from her, in the tract of land of which John Branch died intestate.

Williams v. *Baker.*

The special verdict in this case found that the testator, Robert Bignall, duly made his last will and testament on the 13th July 1809, and that at the time of his so doing, he was upwards of seventeen years old, but not of the age of eighteen; but was of sound discretion. The question reserved is, whether he was of sufficient age to make a will of personal property?

In support of the will, *A. Henderson* and *R. H. Jones* argued at length, and cited may authorities; amongst which

were, *Swinb.* 115. *Sheph. Touch.* 433. *Cooper's Justinian* 493. *Hale's Hist. C. L.* 23, 26. 1 *Reeve's Hist. E. L.* 54. *Preced. in Ch.* 316. 1 *Bl.* 80. 2 *Bl.* 497. 1 *Vern* 255.

Baker, in opposition to the will, cited 3 *Bac.* 118, *A. Dr. and Student* 95. *Infants' Lawyer* 44. *C. Lit.* 89, *b.* 2 *Vent.* 367. *Sheph. Abr.* 130. *Swinb.* 75. *Yelv.* 92. 2 *Fonbl.* 325, *Rud. of L. & E.* 317. 1 *Tucker's Blac.* 62.

CAMERON, J. delivered the opinion of a majority of the Court.*

The only question raised on the special verdict found in this case is, whether a person under the age of eighteen years, can dispose of his personal estate by will.

The common law has wisely fixed on the age of twenty-one, as the earliest period, when the human mind has attained sufficient maturity to act with discretion. The rules established in the ecclesiastical courts in England, which allow infants to dispose of their personal estate by will, have never been in force and use in this State. If they had, we should feel ourselves bound by them, notwithstanding their repugnancy to common sense, and the common law. We cannot subscribe to the doctrine that a person may have a legal capacity to dispose of property by will, and yet be under a legal incapacity to dispose of the same property by deed.

TAYLOR, C. J. The consideration of this cause has not enabled me to concur in the opinion which has been delivered. But as the Legislature has, by a recent act, provided for all future cases, I shall content myself with stating, in few words, the grounds of my dissent.

That the testamentary age, when this will was made, commenced at fourteen in males and twelve in females, is, I think, proved by the act of 1715, which validates all pro-

* Seawell, J. gave no opinion.

bates made before that time, and places them on the same footing with probates made before an *ordinary* or *ecclesiastical* Judge or person; and by the act of 1789, c. 23, which transfers the power to the County Courts. The Legislature must have been aware of the age at which persons were considered as capable of making testaments, in the Ecclesiastical Courts; and where jurisdiction over a subject is transferred from one Court to another, without limitation, it must be understood that the Court to which it is transferred, is to proceed according to the rules and principles adopted in the Court from whose cognizance the subject is taken.

The age of making a testament was originally derived from the civil law; but so are the rules which relate to representation in dividing an intestate's estate; and the evidence of the adoption of both by the common law is equally satisfactory to my mind. *Shepherd's Touchstone*, written by an eminent common lawyer, *Justice Doddridge*, states the testamentary ages at twelve and fourteen; *Hargrave*, in his Notes on *Co. Littleton*, is to the same effect; together with many other writers. In *Mosely's Rep.* 5, the same rule is admitted in the Court of Equity. That the common law knows no rule different from this, is evident from their refusing to issue a prohibition to the Ecclesiastical Court before which a testament was proved, made by an infant under twenty-one.—2 *Mod.* 315. The common law itself has established the same ages for certain things, as in choosing a guardian, and the capacity of committing crimes. I cannot but think it probable, that this rule has been acted upon in this State, and as it is to be found in all those books which the Legislature has directed the County Courts to be furnished with, it has been considered a matter of course and never drawn into question,

Ballora and wife v. *Hill.*

SEAWELL, J. This case presents the claim of half blood on the mother's side, to lands derived by the intestate from the father, and depends upon the same question which was decided at this term in the case of *Hilliard* v. *Moore*. The demurrer must therefore be sustained and the bill dismissed.

Wistar v. *Tate.*

Assumpsit against the defendant as indorser of a promissory note, made payable to him by Kittera and Musser, dated 25th August 1795, and payable a twelvemonth after date. The endorsement was in the following words, " pay the contents to W. Wistar, or his order, for value received, with recourse to me at any time hereafter, without further notice."

The makers of the note were insolvent in 1797; but separate suits were brought against them in 1799, in which judgments were confessed; but nothing was made by the execution, which was returned in 1800. A demand was made on the defendant in 1815; after which this suit was brought. The pleas were 'general issue' and 'statute of limitations.'

Henderson, for the plaintiff. *Browne*, for the defendant.

For the plaintiff it was urged, that the terms of the endorsement gave the plaintiff a right to call apon the defendant, whenever thereafter he thought proper, without limitation as to time, or restriction as to the person's performance of any act on his part. In an ordinary endorsement the plaintiff must have made a prompt demand upon the drawer, and in case of failure, have given notice to the defendant;

and after all this, must have brought his action within three years, if the defendant thought fit to plead the statute. But the doing of those things has been dispensed with by the defendant, who has also restrained himself from taking advantage of the statute. That in the most favourable construction for the defendant, the cause of action accrued only upon the demand; so that the suit being brought immediately after that, the statute has not attached.

For the defendant it was insisted, that the statute must be presumed to be pleaded the right way, either *non assumpsit tres infra annos* or *actio non accrevit*, as the case may require, or even both ways.

Where the action accrues by the promise, the plea is *non assumpsit infra*, &c. Where it accrues by some collateral matter, *e. g.* "if you will board such a one, I will pay you," it is *actio non.*—*Esp.* 156. If it be, as has been urged, that the action could be brought at any time hereafter, next moment or 100 years, the plea would be *non assumpsit infra*, and is certainly a bar. What is it but a promise to pay on demand? If it was, that he might at any time hereafter have recourse, *provided he could not get the money from the obligor*, after using due diligence, the cause of action, if it accrued at all, accrued in 1798, as completely as when the writ was brought; and so the statute is a good bar still, but the plea is *actio non accrevit*. With respect to the maxim of *quisquis potest* &c. that signifies that the defendant is not obliged to plead them.—*Gilb. L. E.* 43. But if the statute is pleaded, then the law says the suit shall not be maintained, and the parties saying it may, signifies not.

The Court will not under any circumstances assume jurisdiction, where it has none—4 *Vesey, jr.* 790. 5 *Ibid.* 581. Nor can the agreement of parties oust the jurisdiction of the Court.—1 *Wils.* 129.

TAYLOR, C. J. delivered the opinion of the Court.

This action cannot be supported on the ground of general average, because the rule of the maritime law upon which such claim is founded, renders it indispensable that the goods should be thrown overboard to lighten a ship, in which case the loss incurred for the benefit of all shall be made good by the contribution of all. It is not sufficient even that the goods are washed overboard by the agitation of the sea, or destroyed by tempest or lightning; they must be thrown overboard by the direct agency of man for the purpose of easing the vessel in a moment of peril, and thereby increasing the chance of her preservation, and that of the residue of the cargo.

The plaintiff claims from the defendant a proportionate part of the expence of raising the vessel and cargo, but such claim it is impossible to fix on the principle of a general average, because all were involved in the same common calamity, and no portion was sacrificed for the safety of the rest. The cases where the expence incurred in relation to goods have become the subject of a general contribution bear no analogy to the present one. A ship may sustain damage in a storm which cannot be repaired without unlading the goods, and as all are interested that the voyage should be continued, the expence of such unlading should be borne by the owners of the goods. Yet if sails are blown away, or masts or cables broken, the owner alone must bear the loss. The defendant's goods in this case were not saved, nor was the vessel raised with any view to prosecute the voyage: that was necessarily ended by the oversetting of the vessel and the consequent injury to the cargo. But the decisive ground on which this claim must be rejected, and which is also an answer to the claim for salvage is, that the damage and consequent expense proceeded from the neglect of the owner himself. It was his duty not only to have provided a sufficient vessel at the commencent of the voyage, furnished with whate-

ver was necessary to convey her cargo in safety through an uncertain navigation, but to maintain her in a proper condition throughout the whole voyage.

The neglect of providing shifting boards where the cargo of grain was incomplete is not to be excused; the necessity of them is admitted by the captain and is obvious to every person. It can scarcely be doubted, that if they had been provided, the vessel would not have overset by a sudden flaw of wind. It is certainly a matter of surprise that no accident of the kind has happened before, and can only be accounted for by supposing that a continual vigilance has been exercised to meet the approach of sudden flaws of wind, and by taking in sail before they strike the vessel. But the general neglect of ordinary precaution cannot excuse him who has thereby occasioned a loss to another's property; and no reason can be urged, why the shipper of goods or a passenger should be made liable, in any shape, towards the performance of a duty incumbent on the owner. This would be to place him in a more unfavorable situation even than an insurer on the vessel, who is not liable on the policy for the vessel, nor even for goods shipped in the vessel by a person no way interested in her, if she has any deficiency in any one article necessary for safe and secure navigation.

Gilchrist v. *Marrow.*

This cause was tried before DANIEL, J. at Cumberland Superior Court. It was an action of covenant to recover damages for the breach a warranty of soundness contained in a bill of sale, whereby the defendant sold to the plaintiff "a girl slave, named Mary, about eleven years of age, *sound and healthy*, and do by these presents *further* covenant and

CAMERON, J. delivered the opinion of the Court:

Although the endorsement of the notes to the plaintiff is couched in unusual terms, we cannot give to them the extraordinary latitude, which would subject the defendant to the payment of the demand after any lapse of time, as contended for the plaintiff. To place these cases on the most favourable grounds for the plaintiff, we must say, that the cause of action accrued against the defendant, from the return of the executions against the drawers of the notes. That was in 1800. No demand on defendant was made till January 1815, when the plaintiff's demand was most clearly barred by the statute for the limination of actions.

Judgment for defendant.

Irving v. *Glazier.*

The plaintiff declares, in an action of indibitatus assumpsit upon two counts, for money laid out and expended, and for work and labour done. To which the defendant pleaded 'the general issue.'

The plaintiff was the owner of a sloop called the Farmer's Daughter. The sloop was employed by Moses Jones, owner of the schooner Newbern, then bound on a voyage from Newbern to New York, to carry from Newbern to Occacock Bar and there deliver to the schooner a part of her cargo, consisting principally of Indian corn, which the schooner was unable to carry over the shoal near Occacock Inlet called the Swash. The defendant was a passenger in the schooner, and as such entitled to carry his chest or trunk from Occacock to New York free of freight. The sloop received on board the lighter a load which he was hired to carry. It was not a full load for her, and she used no shift-

ing boards. The defendant's trunk, intended to accompany him on the voyage to New York, was also put on board the sloop or lighter to be carried down to the schooner; and for the freight of this to the Bar it does not appear whether there was or was not to be any charge. In this trunk, besides his apparel, the defendant had $545 in cash and bank notes. While the sloop was on her way down the river, a sudden flaw of wind careened her much on her side. The corn shifted over to leeward, and in consequence of this shifting of the cargo, she upset and sunk. Had shifting boards been used, the misfortune would not have happened. Shifting boards is the name for a rough partition of plank made in the hold of a vessel to prevent a cargo from rolling or shifting over from windward to the leeward side. They are well known to all persons concerned in navigation, and are almost universally used by vessels which go to sea with cargoes and corn. It has never been the practice for lighters to Occacock to use them, whether with a full cargo or only with part of a cargo. These generally carry a full cargo; and with a full cargo shifting boards are unnecessary.

The captain of the lighter, admitted to be a man of skill and experience, testified that he should have deemed it proper to put up shifting boards, and would have used them had he known when the lading commenced, that she was to take less than a full cargo. It was testified that this case was the first accident of the kind known to have happened in the river. The plaintiff, after his lighter was thus sunk, at the expiration of , caused her to be raised; and by thus raising her enabled the defendant, who was present during the process, to recover his trunk and its contents. The plaintiff, deeming this a case of general average or salvage, claims from the defendant a contribution to this expense proportioned to the rate, which the money and the bank notes of the defendant thus saved bear to the value of the lighter and cargo thus saved.

TAYLOR, C. J. delivered the opinion of the Court.

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The plaintiff claims from the defendant a proportionate part of the expence of raising the vessel and cargo, but such claim it is impossible to fix on the principle of a general average, because all were involved in the same common calamity, and no portion was sacrificed for the safety of the rest. The cases where the expence incurred in relation to goods have become the subject of a general contribution bear no analogy to the present one. A ship may sustain damage in a storm which cannot be repaired without unlading the goods, and as all are interested that the voyage should be continued, the expence of such unlading should be borne by the owners of the goods. Yet if sails are blown away, or masts or cables broken, the owner alone must bear the loss. The defendant's goods in this case were not saved, nor was the vessel raised with any view to prosecute the voyage: that was necessarily ended by the oversetting of the vessel and the consequent injury to the cargo. But the decisive ground on which this claim must be rejected, and which is also an answer to the claim for salvage is, that the damage and consequent expense proceeded from the neglect of the owner himself. It was his duty not only to have provided a sufficient vessel at the commencent of the voyage, furnished with whate-

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agree to warrant the right and defend the title of the said slave," &c.

On the trial, it was contended that the warranty related only to the title, and not to the soundness; but the Judge being of a different opinion, a verdict was entered up for the plaintiff. The defendant moved for a new trial, which was overruled, and he appealed to this Court.

M'Millan, for plaintiff, cited 6 *Johns.* 49. 10 *Johns.* 484.

Henry, for the defendant, cited *Com. Dig. Covenant. A.*

PER CURIAM.

It is contended by the defendant, that the only covenant contained in this bill of sale relates to the title; and that there is no other express covenant in the deed. We are clearly of opinion, that the following words in the deed contain an averment of a fact, and amount to an express covenant: "I have bargained, sold, and by these presents do bargain, sell, and deliver unto the said Archibald Gilchrist, one certain negro girl slave, named Mary, about eleven years of age, *sound and healthy*." These words are not as has been contended, barely words of description, but aver facts sufficient to maintain this action The warranty of the title in the latter end of the bill of sale, does not destroy or interfere with the covenant upon which this action is predicated. The motion for a new trial must be overruled, and a Judgment entered for the plaintiff.

Cramer v. *Bradshaw*, 10 *Johns.* 484, is a case very much like the present.

Allen and Wife v. *Gentry.*

Detinue for a slave of which the defendant made a parol gift in 1801, to Sarah his daughter, one of the plaintiffs, who in December 1803, and when she was an infant, intermarried with Allen, the other plaintiff, who was of full age. The writ was sued out on the 12th September 1814, and the defendant pleaded the act against parol gifts of slaves.

Norwood for the plaintiff:

This case is excepted by the infancy of the wife and the supervening coverture, and she would have three years after discoverture to bring the action. Since the cases of *Johnson and wife* and *Harris and Norfleet*, decided in this Court, it is understood that the husband cannot sue without joining the wife.

SEAWELL, J. delivered the opinion of the Court:

This case depends upon the proviso of the act of 1806. The act requires all persons claiming slaves in virtue of any parol gift, to bring their actions within a limited time after the passing of the act. And the proviso alluded to, is of the saving to infants, femes covert, &c.

The wife, in this case, was an infant at the passing of the act, and became covert during her infancy, and has continued so, to the bringing the present action; and seems therefore so completely within the savings, as to admit of no question.

But it has been alleged, that the husband who laboured under no disability, *might* have brought an action in his own name, and ought therefore to be barred of the present. And a case decided in this Court some years past, supporting this kind of action in the name of the husband alone, has been relied on. As to that case, it is only necessary to

say, that there are as authorities to support it, 2 *Lev.* 101. 3 *Salk.* 64. 3 *Lev.* 403, and *Bull. Ni. Pri.* 50; but that the present affirmative of the proposition by no means disposes of the question. For by that mode of reasoning, the object of the proviso would be totally defeated; because the husband *can* at all times use the wife's name, and so *may* any of the persons included in the savings bring and *support* their actions; but the Legislature, in tenderness to their situations, exempts their claims from the operation of the act, till their disabilities cease. That the husband and wife *may* join in all actions, which survive to the wife, can admit of no doubt. And indeed it seems now settled that, regularly, they *ought* to join in such cases.

We are *all* therefore of opinion that the present action is not barred, and that there should be Judgment for the plaintiff.

Dyer v. *Rich.*

This cause was tried before DANIEL, J. at Sampson Superior Court, where the certiorari was dismissed; from which decision an appeal was taken to this Court.

The affidavit made by Dyer, on which the certiorari was obtained, stated that he purchased from Rich, a certain slave for the price of $ 450; in payment of which he endorsed a note of Robeson's to Rich, for $ 650, the latter paying the excess by a note, and some produce. That after the sale of the slave, the parties entered into a contract in writing, but without seal, that Dyer should convey the slave out of the State and dispose of him in two months; which he avers he performed. That afterwards Rich sued him upon the agreement to Sampson County Court at May Sessions 1815, which he was unable to attend through a vio-

lent attack of illness, and had no opportunity to employ an agent. That at the return term a judgment final by default was taken against him, and an execution issued. At the succeeding term he moved, upon the foregoing facts, to have the judgment and execution set aside, but was overruled.

The counter affidavit of Rich avers, that the agreement to carry the slave out of the State, was a part of the original bargain, and not made after it; and that if Dyer did remove the slave, it was done so evasively that a very short time afterwards he returned, and is now in Dyer's possession.

SEAWELL, J. delivered the opinion of the Court;

We are all of opinion, that the certiorari should be sustained in this case.

It is stated by the applicant, that he never had an opportunity of making any defence; and from the facts he has stated, if they be *true*, great injustice has been done him. The defendant, in the *certiorari*, does not deny that the trial was *ex parte*, but insists, that according to his belief, the applicant has no defence upon the merits. If, therefore, the petitioner is turned out of Court and he is injured, he is without remedy. But as to the other side, if he has good cause of action, he will still prevail, and his ultimate recovery be secured. Let the cause be placed on the trial docket and a trial be had *de novo*.

Clements v. *Hussey*.

This is an action on the case in *tort*, to recover damages for the breach of a patent right. The defendant pleaded to the merits of the cause, and after the suit had been continued several terms, he died. A *scire facias* was served on

David Mock, administrator of the property of the defendant, returnable to April term 1816; and he pleaded in abatement, that the defendant died on the 5th day of October 1814, and that no process was served on him until the 1st day of April 1816. To which plea the plaintiff replied, that at October term, 1814, the death of the defendant was suggested. He prayed a *scire facias*, against the representatives of the defendant, which was ordered, and that a *scire facias* was made out accordingly; that an *alias scire facias* was issued from April term 1815 to October term 1815, and was delivered to the sheriff of Rowan, the said administrator being a resident in that county, and that *pluries scire facias* was issued from October term 1815, to April term 1816, which was executed and duly returned, the defendant demurred to the replication, and the plaintiff joined in demurrer.

CAMERON, J. delivered the opinion of the Court:

The plaintiff has omitted nothing necessary to prevent the abatement of his action. Process having regularly issued from term to term, after the death of defendant intestate, till the administrator was made party, although not actually served, prevents the abatement which the defendant seeks.

Demurrer allowed, plea overruled.

Gubbs v. *Ellis.*

In this ejectment for plea since the last continuance, the defendant saith, that the lessor of the plaintiff, by his agent and attorney in fact, hath possessed himself of the premises in question and maintains the possession, &c.

To which the lessor of the plaintiff demurs generally. Joinder in demurrer. The question upon the demurrer is, at whose cost the suit shall be dismissed? Which is referred for decision to the Supreme Court.

PER CURIAM.

The costs must necessarily be paid by the plaintiff, whose entry on the premises has destroyed the effect of his writ.

Harper v. *Gray and others.*

SEAWELL, J. delivered the opinion of the Court:

We think a statement of this case will free it from difficulty.

Park's will is exhibited in Randolph County Court for Probate, is carried from thence by way of appeal to the Superior Court: from that Court is removed for trial to Rowan county, where it is tried by a jury who find in favor of the will, and the same is directed to be recorded by the Clerk of that Court, and a *copy* directed to Randolph for record in that county. The petitioners charge that the *probate* was irregular, and petition Randolph County Court to set it aside, and order probate *de novo*. If the probate was irregular, application must be made to the Court which erred, or to one of *controlling* power. The Court of Randolph has committed no blunder which stands in the way, as by the *appeal* to the Superior Court, a new trial was produced. It has no control over Rowan Superior Court; and therefore if it should direct the probate to be set aside and award a rehearing, it would be vain and nugatory. We think, therefore, the petition must be dismissed.

Baker v. *Evans.*

The plaintiff claims title to the premises in the declaration, by virtue of a mortgage deed, dated 17th November 1797, from Samuel Purviance to Isaac Burkloe, to secure the payment of £170, payable 1st December 1799.

The said Samuel was in possession of the mortgaged premises and sold the same to Lewis Johnston, the 5th July 1800, who entered into possession soon afterwards, and in two weeks after Purviance went out. Johnston sold to John Evans the devisor and husband of the defendant 18th of February 1804, who entered into possession in two or three days after Johnston went out, continued in possession, and died seised of the premises, and the defendant has continued in the actual possession ever since. There was no evidence that Johnston had notice of the mortgage before he purchased from Purviance, nor was a knowledge of the mortgage brought home to Evans before he purchased.

But it was proved that Johnston knew of the mortgage before he sold to Evans, and complained of the injury done him by Purviance; and it was proved that about the time Purviance was a candidate for Congress, it was universally spoken of to his disadvantage, that he sold land to Johnston which was mortgaged; and Johnston himself spoke of it as a dishonest act in him. It was also proved, that Evans lived a near neighbour to Johnston and was intimate with him, and the opinion of the witness was, that Evans must have heard that the land was mortgaged. The whole of these purchases were for a full and valuable consideration.

Philemon Hodges proved, that in 1803 or 1804, he was desirous to purchase the land, but had heard of the mortgage and went to Burkloe and asked him if he had a mortgage for it, who answered that he had, but that it was nearly paid up, and for him not to stop purchasing on that ac-

count, for that he should not be disturbed. He proved that Burkloe died in 1807 or 1808.

Jackson proved, that near about the time Johnston sold, he heard Burkloe say to him he had received satisfaction for the mortgage, and that he might sell, he should never be disturbed. The same witness swore that on the trial of this cause in the County Court, David Evans, (then a witness, but now dead) swore, that about one or two months before Evans, the devisor, his father, purchased the land from Johnston, Burkloe told him he had received satisfaction for the mortgage.

George Evans, another son of the devisor of the defendant, swore that Burkloe told him the day before his father purchased the land, that he had no mortgage for it, and he searched the Register's office for a mortgage, but could find none. The mortgage produced, was not registered until after the commencement of the suit.

The jury found a verdict for the defendant. And on motion for a new trial, the same is ordered to the Supreme Court, on the following questions:

1st. In a case like the present, is there such an adverse possession as upon which the statute will attach?

2d. The estate once forfeited and become absolute at law, is it a good defence in ejectment by the mortgagee to offer parol evidence of the payment of the mortgage under the act of Assembly, or such evidence as is here offered?

Henry, for the plaintiff, cited *Powell on Mortg.* 207, 219.

M'Millan, for the defendant, cited 3 *Bla.* 435. *Powell Mortg.* 54. *Douglas* 630.

PER CURIAM.

Samuel Purviance executed the mortgage deed to Burkloe, on the 17th November 1797, to secure the payment of £170, payable 1st December 1799. The mortgagor was permitted to remain in possession, and after the time the mortgage became forfeited, to wit, on the 5th July 1800, he conveyed the land to Lewis Johnston, who had no notice of the mortgage, and who entered into possession of the premises, and held them as his own property until the 18th February 1804, when he sold the premises to John Evans, who entered as soon as Johnston went out of possession, and continued the possession as long as he lived, and the defendant (his widow and devisee) has continued in possession ever since.

It appears from the case, that Lewis Johnston, John Evans, and the present defendant did, each in succession, hold the possession of the land, as their own, and adversely to all the world. It does not appear from the case, when the action was commenced; but it is admitted that it was more than seven years after the entry of Johnston. We are of opinion, that the defendant and those under whom she claims, have been in the continued possession of the premises, under a colour of title for more than seven years, holding the lands adversely to all the world, and therefore the act of 1715 bars the lessor of the plaintiff in the present action. The opinion given by the Court, upon the first point in the cause, renders it unnecessary to give any opinion on the second point.

The motion for a new trial in this cause is overruled.

State v. *Commissioners of Fayetteville.*

Gaston, for the defendants, cited *Crown Circ. Comp.* 307. 1 *Hawk.* 368. *Acts* 1786, c. 18, § 4. 1715, c. 36, 2, 1784, c. 14. 1786, c. 18. *Private Acts* 205. 2 *Hayw.* 228. 1 *Hayw.* 243.

M'Millan, for the State, cited *Private Acts* 1783, c. 25, § 7. *Crown Cir. Comp.* 548. *Doug.* 797. 2 *Coke's Inst.* 701.

DANIEL, J. delivered the opinion of the Court:

It is referred to the Supreme Court to decide upon consideration, of the public law, and of the private acts which have been passed to regulate the town of Fayetteville (which private acts are a part of this case) whether the persons who hold the office of Commissioners are liable to an indictment upon the ground that the streets are out of repair.

We are of opinion, the defendants are subject to an indictment, if the streets of the town are permitted to be and remain out of repair. Annoyances in highways, by rendering the same inconvenient or dangerous to pass; either positively by actual obstructions, or negatively, by want of reparations, are deemed nuisances. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse the same, may be indicted.

Let us examine who are bound to repair and cleanse the streets of the town of Fayetteville. By an act of the General Assembly passed in the year 1787, the Commissioners are invested with full power and authority to make rules and regulations, and to pass ordinances, for levying and collecting taxes on the persons and property in said town; and they are directed and empowered to appropriate the money which they shall cause so to be collected to various objects for the good government and well-being of said town.

One of which objects, as expressly declared by the act, is the reparation and keeping in good order the streets of said town. It is not denied, that the keeping the streets in repair, is a thing that concerns the public in general. If the Commissioners are guilty of omission, in laying the taxes, and appropriating some part of the proceeds, in repairing the streets; I would ask if they have not completely omitted to perform an essential duty, imposed upon them by law, which duty was of public concern? The law says, that where a statute commands or prohibits a thing of public concern, the persons guilty of disobedience to the statute, are liable to be indicted for the disobedience. The Commissioners, instead of calling out the hands to work on the streets, like an overseer of the public roads, call forth the pecuniary resources of the town, and hire labourers to perform the duty, &c. It has been said, that as the Commissioners are annually elected, it might so happen that one set of Commissioners might be punished, for the omission of their predecessors in laying the taxes, &c. The defendants are charged in the indictment with their own culpable omission and negligence, and not with the faults of others; and unless this principal charge in the indictment, be substantiated, they cannot be convicted. The law requires an impossibility of no man.

The demurrer is overruled.

LOWRIE, J. I doubt.

M'Farland v. *Patterson.*

This cause was tried before DANIEL, J. at Robeson Superior Court. It was an action of assumpsit. There were two counts in the declaration. One on an agreement reduced to writing by the parties; the other for goods sold and delivered. The plaintiff failed to produce the agreement

declared on, and moved to give parol evidence of its contents, offering to prove by his own oath that the agreement was lost. The Court would not permit him to prove the loss by his oath. He then introduced two witnesses, who deposed as follows, viz. John M'Farland stated, that the plaintiff had a small chest at his turnpike bridge where he kept many of his valuable papers, such as deeds, &c. That it had a lock on it. That the plaintiff had his, the witness's, bond for a sum of money, which he paid on a report of his the plaintiff's valuable papers having been lost, and has never seen the bond since. Sarah M'Farland said, that she lived at the plaintiff's turnpike-house; and some time after the commencement of the suit, one night after she had gone to bed, she was awaked by the noise of an old negro woman who was scolding at some body. She then got up and found the chest open. When she went to bed the chest was shut. It had a lock on it; but she does not know whether it was locked that night. She saw some papers in the chest afterwards.

The Court permitted the plaintiff to give parol evidence to support the second count in his declaration, which was for the sale and delivery of a yoke of oxen, cart, and log-chain, and were the principal subjects of the agreement mentioned in the first count. The plaintiff obtained a verdict (after all the evidence of each party was given in) for fifteen dollars.

A new trial was moved for, because the Court had permitted parol evidence to be given, without sufficient evidence of the loss of the written agreement, which was overruled and appeal taken to this Court.

PER CURIAM.

We are of opinion, that the loss of the written agreement was not sufficiently established to let in the plaintiff to prove the contents of it by *parol*. This case does not come

within that class of cases which authorises a plaintiff to abandon his count predicated upon a special undertaking which has been reduced to writing, and recover on a *quantum valibat*, or any other general count which may be incorporated in his declaration. Those cases are, where the plaintiff has performed a part of the work or duty which he bound himself by his written agreement to perform, or when it is done not in pursuance of the argreement, and the defendant has had the benefit of the work or other thing thus imperfectly executed. In a case of that kind, it is very clear that the plaintiff could not recover on the special contract, because he would be unable to aver and prove performance;—and it would be the height of injustice to permit the defendant to derive a benefit from the plaintiff's labour or services, without an adequate compensation. Therefore, the law will, in such cases, permit him to abandon his special agreement and recover upon the other counts in his declaration.—10 *Johns.* 36.

The case now before the Court, stands upon the long established rule, that parol evidence cannot be admitted to prove the contents of the written contract, unless it shall be clearly made appear that the written contract is lost by time or accident.

The plaintiff not having shown that the written contract was lost in either of the above ways, he should not have been permitted to prove the same by parol.

A new trial must be granted.

Deaton v. *Gaines.*

IN EQUITY.

Joseph Deaton, being seised of a tract of land, agreed to sell it to one William Smith, who gave his bond to

Deaton for the purchase money, and Deaton gave his bond to Smith to make him a deed for the land. No time was mentioned in the bond within which the deed was to be made.

When Smith's bond became due, Deaton brought suit on it, and Smith brought suit against Deaton upon his bond to make title. Deaton recovered a judgment against Smith, and Smith was non-suited in his suit against Deaton.

Soon after Smith sued Deaton, Deaton tendered him a deed for the land, which he refused to accept. Deaton placed this deed in the hands of his attorney in the suit, and returned to the Mississippi, where he resided.

An execution was sued out at the instance of Deaton on his judgment against Smith, and no personal property being found, the execution was levied upon Smith's equitable estate in the said tract of land, which was sold by the sheriff and purchased by James Gaines, for a sum much less than the judgment and costs. Gaines, at the time of the purchase, had full notice of all the preceding facts, and of the further fact that Smith was insolvent, and had no property out of which the residue of Deaton's debt could be made. Some time after the sale of the land by the sheriff, and at the Court at which Smith was nonsuited, Deaton's attorney handed to Gaines the deed aforesaid, but not by the direction of Deaton or with his knowledge.

It is submitted to the Court, whether Gaines is bound to pay the residue of the debt, or to surrender his purchase upon his receiving back the money he has paid with interest?

DANIEL, J. delivered the opinion of the Court:

Gaines was a *bona fide* purchaser under a regular judgment and execution, at a sheriff's sale. I would ask what principle of equity it is, which can compel Gaines to pay the balance of the judgment or surrender the lands, as the

complainant proposes? I confess I know of none. The equitable estate of Smith in the land was subject to an execution, by virtue of the act of Assembly of 1812, c. 6. Gaines was the highest bidder. He is entitled to keep what he bought on paying his bid.

The bill should be dismissed with costs.

Byrd v. *Clark*.

An action of ejectment in which the plaintiff obtained a verdict; and the question reserved was, whether the premises were sufficiently described in the declaration to authorise the issuing of a writ of possession. The description is as follows:—"One tract of land containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke River, on the south side; it being part of 350 acres, according to contents of patent granted to John M'Caskey the 7th November 1730; beginning at a sycamore tree supposed to be Colonel Cullen Pollock's line, and so extending out and in, according to courses of patent aforementioned, to conclude and make out the above said 150 acres, with the appurtenances."

Browne, for the plaintiff:

In ejectments, there is no great certainty required in the description of the premises; for the sheriff's assistance is required only for the purpose of preserving the peace.—2 *Cromp. Prac.* 212. He delivers possession on the showing of the plaintiff, who is at his peril, to take possession of no more than he is entitled to. And if he does take possession of more, the Court will set the matter right in a summary way.—1 *Burr.* 623. 5 *Burr.* 2672.

The precedent in 2 *Cromp Prac.* 162, is of "four messuages, four barns, with the appurtenances, in the parish of St. Mary, Islington." In which parish there are probably more than 400 messuages, and as many barns; any four of which would answer the description.

In *Lilly's Entries* 192, it is of "five messuages, twenty cottages, 400 acres of land, 200 acres of meadow, 400 acres of pasture, with the appurtenances, in Welhen-Slawston, Harborowe and Bowden Magna." And the other precedents in the same book, are not more accurate in their description.

The description in the caae before the Court, is of "one tract of land, containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke, on the south side, it being part of 350 acres granted to John M'Caskey, the 7th of November 1730, beginning at a sycamore tree, supposed to be Colonel Cullen Pollock's line. This, without laying any stress on the balance of the description, is more accurate and precise than that of any of the precedents in the books.

There never occurs a case of disputed boundary, where the Court and jury can decide solely on the description in the grant or deed. They are obliged to have recourse to the testimony of witnesses. As the sheriff cannot do so, he has recourse to the information of the plaintiff, who gives it to him at his peril.

PER CURIAM.

We are of opinion, that a writ of possession ought to issue, and that the description is sufficiently certain for that purpose.

Shepherd v. *Monroe and others.*

This bill was filed against the defendants Malcolm Monroe, Pleasant Wicker, and John M'Lennon; all of whom, with the complainant, were co sureties for one Nathaniel Williams, to Thomas Stokes, since deceased, in a penal bond conditioned to pay £ 93 7 6, with interest.

Stokes afterwards recovered judgment and execution on the said bond against the said Nathaniel, the principal, and the complainant and the defendants, the sureties. The *fieri facias* was returnable to May Court 1810, levied on Shepherd's property, and Shepherd paid the execution, viz. £107 1 1½. Williams, the principal, is insolvent.

The end of this bill is, to compel the defendants, who were co-sureties for Williams, with the complainant, to contribute their proportionable parts of the said debt and the costs and expenses thereby incurred and paid by the complainant.

The defendants have been duly served with process &c. and are all in contempt for want of answering, and the bill is taken *pro confesso*, absolutely, against all of them, and the cause held for hearing *ex parte* at the next term. And now at this May term, 1816, a motion is made by the counsel of Monroe to dismiss the bill for want of equity. To which the complainant's counsel objects,—1st, because it is not regular or proper to dismiss for such a cause, on motion, and it is too late even to demur and *a fortiori* to move to dismiss. 2dly, That there is equity in the bill, and the remedy lately given at law does not take away or oust the Chancery of its jurisdiction.

The questions therefore submitted, are, 1st, Can this bill under its circumstances be dismissed, on motion, at this time? 2dly, Is there equity to sustain the bill?

DANIEL, J. delivered the opinion of the Court:

Before the year 1807, it was thought a bill in equity was the only remedy a party could have, to obtain his right in a case like the present. In that year, the Legislature passed an act giving an action at law; but on examining the act, we do not discover the Legislature intended to oust the Court of Chancery of its jurisdiction altogether; for there are no negative words in the act. We are, therefore, of opinion, that this Court has concurrent jurisdiction with a court of law. In England, courts of law have sustained actions, of late, by one security against the other, when the principal has become insolvent; and we find authorities which say, the Court of Chancery retains its jurisdiction in such cases notwithstanding.—*Coop. Plead.* 142. 5 *Vesey* 792. 8 *Vesey* 312.

The motion to dismiss the bill is overruled. It is unnecessary to decide the other point in the cause.

Wright's Executors v. *The Heirs of Wright.*

This was an issue to try the validity of a paper writing, offered by the plaintiffs as the last will and testament of John Wright, deceased. It was witnessed by James Berry and Demsey Squires.

On the trial, it was proved, that James Berry, one of the attesting witnesses, had left the country some time before and was not to be found. Squires, the other witness, then proved that the will was duly executed by John Wright in his presence and that of the witness Berry; and that each of them subscribed as a witness, at the request of Wright; Berry subscribing in the presence of this witness.

Squires also proved, that he was sent for by Wright to attest this will. That when he came, Wright and Berry were together. That Wright requested this witness to leave the room until Berry read over the will to him. That after remaining out of the room some time, he was called back, and then the will was executed, as stated above. That the whole of the will was in Berry's hand-writing. It was also proved, on the part of the plaintiffs, that Wright had made a former will which was also written by Berry; in which the legacies and devises were nearly the same as those contained in this.

The defendants then offered to prove, that Berry was not a credible witness. This was objected to; but the Court overruled the objection and permitted the testimony to be introduced. A number of witnesses proved, that Berry's general character was such, that he was not entitled to be believed, on his oath. It was then attempted to discredit Squires, the other witness. The only evidence to this effect was, that of two witnesses, who deposed that soon after Wright's death, they had heard Squires say, he had not heard Wright acknowledge it to be his last will, and if it was not proved till they proved it by him, it would never be done. All the witnesses, and these two among the rest, deposed, that Squires had always borne an excellent character for probity and honesty; and that they would not hesitate to believe him on his oath.

The Court, after recapitulating all the evidence in the course of the charge to the jury, told them, that if they believed the evidence of Squires, although Berry was not a credible witness, they ought to find that it was a will.

The jury found that it was not the will of John Wright. A new trial is moved for on the grounds that the evidence as to Berry's credibility, was improperly admitted and tend-

ed to give an improper bias to the jury, and that the jury found a verdict directly contrary to the evidence.

It is agreed, that the foregoing case be submitted to the Supreme Court; and if they are of opinion, that a new trial be granted, then that the verdict be set aside and a new trial granted; otherwise the verdict to stand.

CAMERON, J. delivered the opinion of the Court:

This case gives rise to no question of law. The matters of fact having been passed on by the jury, their verdict must stand; and the motion for a new trial must be overruled.

B. Hawkins v. *P. Hawkins.*

The question in this case arose upon the admissibility of the deposition of C. Marshall, under the following circumstances. Marshall was an original defendant in this bill in equity, in which it was charged that certain deeds were delivered to him a sa trustee to be re-delivered to P. Hawkins, deceased, upon his request, which he made in his lifetime; but Marshall refused to re-deliver them. The bill contained a prayer for the delivery up of the deeds, which it appeared had been delivered up to P. Hawkins, jun. the defendant's son, after the death of P. Hawkins, deceased, to whom the promise had been made. The deeds were annexed to the answer of Marshall, and they were proved and recorded, and his answer submitted it to the Court to do with them what might be just. The deposition of Marshall had been taken, subject to all just exceptions, and the object of it was to show that he was a subscribing witness to the deed, that they were delivered unconditionally, and that he kept possession of them during the lifetime of P. Hawkins, deceased, with his consent and approbation.

Marshall afterwards died, and the suit has not been revived against his representatives.

Upon several issues submitted to the jury, they found that Marshall was requested by P. Hawkins, deceased, of his own will, to re-deliver the deeds, which he unjustifiably refused to do.

The question was argued by *A. Henderson* and *Gaston*, in support of the deposition, and *Browne*, against it.

The grounds assumed in favour of the deposition were, that when Marshall attested these deeds, the defendant acquired an interest in his testimony, of which he could not afterwards be deprived without his own act. That any subsequent interest of Marshall's cannot render him incompetent. That the interest must exist at the time the fact happened which the witness is to prove, or be thrown upon him by operation of law, or the act of the party calling him. If a witness were allowed to disqualify himself, or if the adverse party could deprive the party calling him, of the benefit of his testimony, the utmost injustice would ensue.—*Bent* v. *Baker*, 3 *Term. Rep.* 27. It was further urged that Marshall was a mere formal party, having no interest in the cause; and the suit being now in progress without being revived against his representatives, shows the light in which the plaintiff made him a party to the bill.—2 *Atk.* 229. 2 *Vesey* 220.

Against the deposition it was urged, that persons interested are excluded from giving testimony.—*Gilb. Law Ev.* 121, 2. Also those who are stigmatized.—*Ib.* 142.

If an instrumentary witness after subscribing becomes interested as executor or administrator of the obligee, his hand-writing may be proved as if he was dead.—1 *Str.* 34. 1 *P. Wms.* 289. So if such witness afterwards becomes infamous.—2 *Str.* 833.

If an instrumentary witness is interested at the time of subscribing, and at the trial, he cannot be a witness; nor can his hand-writing be proved.—*5 T. R.* 371. *Esp. N. P.* 258.

It is charged in the bill, and also found by the jury on the trial of the issues, that the deed for the re-delivery or setting aside of which this bill was brought against Charles Marshall and P. Hawkins, jun. was delivered to the said C. Marshall, on trust to re-deliver it to P. Hawkins, sen. if he should require him so to do: and also that the said P. Hawkins, sen. did require the said C. Marshall to re-deliver the said deed to him, P. Hawkins, sen. which he the said C. Marshall refused to do, and in breach of his trust, delivered it to P. Hawkins, jun. the other defendant. Under such circumstances, the deposition of C. Marshall, taken while the bill was pending against him, cannot be read in evidence; because he was, *at least*, liable to costs. *3 Atk.* 401. *Barrett* v. *Gore and Umfreville* in point. Nay, if P. Hawkins, jun. should be unable to compensate the injury sustained, C. Marshall would be decreed to do so.—*3 Bro. Ch. Rep.* 112. *1 Vesey, jr.* 206.

The witness C. Marshall was placed in this situation with the consent of the other defendant, P. Hawkins, jun. who received the deed from him, and now wishes to use his testimony in exculpation of them both. He hath poisoned the source, and now insists that we shall drink of the stream.

The *dicta* that "if, after the event, the witness become interested by his own act, without the interference or consent of the party by whom he is called, such subsequent interest will not render him incompetent, *Peake's Ev.* 157, 8, and if they be law, do not apply to this case. This doctrine is mentioned in *Bent* v. *Baker*; but that case was not decided on it; and Lord Kenyon calls it a minor point. It is not easy to imagine a case to be decided upon this distinction.

In *Allen* v. *Hearn*, 1 *T. R.* 56, a wager between two voters was held to be void, as having a tendency to induce bribery and corruption at elections. And ought not a wager, or any other contract or transaction by which a witness attempts to gain an interest concerning a suit in which he is to give testimony, to be also void, as having a tendency to induce perjury?

If a witness is convicted of perjury, or otherwise becomes infamous, the party loses his testimony, however material it may be: and why shall he not, if the witness becomes interested? Interest disqualifies from giving testimony as completely as infamy.

TAYLOR, C. J. delivered the opinion of the Court:

It appears from the statement sent up, that the character given by the bill to C. Marshall, is that of a trustee, and the question is, as to the competency of his testimony? Upon this subject there is a variance in the practice of courts of law and equity. In the first, no person made a defendant can be a witness, unless in some particular cases where he is improperly made a defendant, and there is no proof against him; in which case, the jury are directed to pass upon him, and upon acquittal, he is received as a witness. In the Court of Equity, it is frequently necessary to make a person defendant for the sake of form; and then it is almost a matter of course to examine him upon motion. Where a trustee has the legal interest in an estate, but is in all other respects nominal, he cannot be examined at law as to the merits or design of the deed, but there are several authorities to show that he may be admitted in equity. It is not to be understood, that these rules of evidence at law and in equity differ in general, but only in particular cases. Where fraud is charged by a bill, or the inquiry is relative to a trust, the jurisdiction of this Court would be greatly circumscribed, and its power of fully investigating the latent

elements of a transaction over which artifice sometimes spreads the thickest disguise, much abridged, if it were confined within the strict rules prescribed by courts of law. In *Ambler* 393, a trustee plaintiff was examined on behalf of a defendant. In 1 *P. Wms.* it was ordered that the defendant might examine one of the plaintiffs who were assignees of a bankrupt as a witness for the defendant. In *Gilb. Eq. Rep.* 98, it is said, that a defendant may be made a witness because he is forced into the suit. In *Ambler* 592, the deposition of a trustee was admitted to be read as to the quantity of trust money in her hands. In 2 *Vesey* 629, it is said that when a trustee or attorney is a defendant, the objection goes only to his credit. If he is *particeps fraudis*, or interested, it goes to his competency. We cannot consider Marshall in any other light than as a formal party. The suit is not revived against his representatives, and they, therefore, cannot be liable to a decree or the costs.

There must be a new trial, and his deposition is allowed to be read.

Arrington v. *Horne.*

Defendant offered, and was permitted to read in evidence the deposition of a Mr. Hardy. It stated, that he had purchased the bond on which the present suit was brought, pending the action, and that this purchase was from the plaintiff, and for a valuable consideration; that this purchase was without writing, and accompanied with the delivery of the attorney's receipt for the bond; that afterwards deponent, for a valuable consideration, sold the interest in the said bond to a Mr. Purnell, and that he had made an endorsement to that effect, upon the receipt of the attorney;

which receipt was produced in Court, endorsed as stated by the deponent. Defendant then offered in evidence the receipt and release of Purnell in discharge of the bond; which release contained on the part of Purnell, a covenant of indemnity to defendant. Defendant also offered in evidence, a settlement of mutual dealings between himself and Purnell, at the time the amount of the bond was taken into consideration and the receipt given. Plaintiff then gave evidence, that at the time he parted with the attorney's receipt for the bond, that the interest of the bond was sold conditionally, namely, that Hardy was to give surety to a bond that day executed to the plaintiff; and that he had called on Hardy to do so, and that he failed, and soon after became insolvent and was dead. Plaintiff further gave in evidence, that he gave notice to Purnell and defendant before the payment and receipt, but after Purnell's purchase, that he claimed the interest in the bond. It further appeared in evidence, that the plaintiff had brought suit on the bond given by Hardy, before mentioned, recovered a judgment, and that Hardy was taken in execution and swore out of jail.

This evidence was all given to the jury, subject to the charge of the Court: and the Court directed the jury, that neither the receipt or evidence of settlement amounted to a payment, who found accordingly; and upon motion for a new trial, the same is transmitted by order of this Court to the Supreme Court.

SEAWELL, J. delivered the opinion of the Court:

This may be a hard case, but sitting in a *court of law*, the plaintiff must prevail. We cannot look into the *equitable* claim of persons who are, or are not *parties*, but must dispose of each case as the rules of *law* direct. Whether, therefore, the plaintiff has parted with the *beneficial* interest in the bond on which suit is brought so as to enable such assignee in *equity* to discharge it, must be referred to the

rules of a court of equity. According to the rules of law, the right of action still remains in him, and as such must be respected. He having done no act which in *law* has *passed* his interest, nor which in *law* has defeated such right of action, there is nothing by which a court of law can restrain him. The idea of defendant's paying in *good faith* to one he supposed *authorised* to receive, is entirely excluded, from the circumstance of his taking a bond of indemnity. As to *him*, therefore, he acted with his eyes open, and during the pendency of the present action.

Wherefore, we are all of opinion, that the rule for a new trial, be discharged.

State v. *Everit.*

This was an indictment against the defendant as the overseer of a road, charging the said road to have been out of repair. The defendant had pleaded 'not guilty.' Evidence of the defendant's having acted as overseer, was offered on the part of the State. It was objected, that no evidence other than the record of his appointment, was admissible to charge the defendant as overseer. A juror was withdrawn by order of the Court and without the consent of the defendant. And it is referred to the Supreme Court, whether any other evidence than the record of his appointment from the County Court, be admissible for the purpose of showing the defendant to be the overseer, and whether defendant can again be put upon his trial.

PER CURIAM.

This case must be governed by the regulation which the Legislature has thought proper to make on the subject; and as the act of 1812 has declared that an overseer shall not be responsible for the insufficiency of the road, until ten

days after he is served with notice of his appointment, such notice and the time of service form an indispensable part of the testimony before legal guilt can be inferred.

State v. *Bright.*

This was an indictment against the defendant, who is Register of Lenoir County, for taking a greater fee for copying a deed than the law allows. Upon 'not guilty' being pleaded, the jury found that the defendant took more than his legal fee, but that he did not take it corruptly.

A motion was made in behalf of the defendant, that the verdict be entered up as one of acquittal; and a motion was made on the part of the State, for a *venire facias de novo*.

LOWRIE, J. The jury having found that the defendant did not take the fee charged in the indictment *corruptly*, have by their verdict negatived the very *gist* of the indictment, it is equivalent to a verdict of 'not guilty.' The defendant must, therefore, be discharged.

Jeffreys and others v. *Alston and others.*

DANIEL, J. delivered the opinion of the Court:

This was a petition to the County Court of Franklin to set aside the probate of William Jeffreys's will and re-examine the same for the several grounds mentioned in the petition. The practice in cases of this kind has been settled by this Court in the case of *Moss and Wife* v. *Vincent*, an affidavit must be annexed to the petition "verifying the facts on which it is sought to set aside the probate of a will."

It appears that the accompanying document alleged by the petitioners to be an affidavit, was sworn to before William Boylan, esq. one of the justices of the peace in and for the county of Wake. We are all of opinion, that the deponents could not be convicted of perjury, provided the contents of said document were false, as the Justice of Wake county had no legal authority to administer an oath to any person to prove the contents of an affidavit which was to be made use of in the County Court of Franklin.

The Court are of opinion, that as this petition stands without any accompanying affidavit, it must be dismissed.

Gervin v. *Meredith.*

This was an action of trespass *quare clausum fregit.* The plea '*liberum tenementum.*' The dispute is altogether as to the boundaries of two tracts of land.

The declarations of a man by the name of Wingate, who lived on the land upwards of twenty years ago, and who was the tenant and son-in-law of the person under whom the defendant claims, were offered in evidence by the plaintiff and admitted by the Court.

The jury found a verdict for the plaintiff; and a motion was made for a new trial, on the ground that the evidence of Wingate's declarations should not have been admitted, *as he is now alive*, but lives in the State of Tennessee, and beyond the process of this Court

CAMERON, J. delivered the opinion of the Court:

The rule which allows hearsay evidence to prove the boundaries of lands, restricts it to the declarations of *deceased* persons. We do not conceive that the circumstance

of the witness living out of the State, authorises any relaxation of the rule. The testimony of the witness, though living in Tennessee, might have been procured by deposition. The declarations of the witness, not on oath, was not the best evidence, which it was in the power of the party offering it to adduce.

We are, therefore, of opinion, that the rule for a new trial should be made absolute. A new trial granted.

Steele, Chairman, &c. v. *Harris.*

This was an application, on the part of the defendant, under the following cirumstances. At the sessions of the County Court of Rowan, when the verdict was taken against the defendant, he prayed an appeal, which was granted; and his attorney prepared an appeal bond, and requested the clerk of the County Court to send it or take it up with the other papers, who promised to do so. The clerk of the Superior Court was absent from the State a considerable time, and the County Court Clerk transacted business for him; but the latter was also in the habit of returning all appeal papers to the Superior Court, and these papers he undertook to file in time. He accordingly brought them to the town where the office was kept, but neglected to leave them. He, however, considered them as filed, and so informed the clerk of the Superior Court upon his return.—The clerk of the Superior Court returned three weeks before the sitting of the Court, but the papers were not actually filed till the week preceding the Court, and then it was that the information was given him that the clerk of the County Court considered the papers as filed. The Superior Court office is kept seven miles distant from the County Court.

The plaintiff also moved to amend the writ.

CAMERON, J. delivered the opinion of the Court:

The circumstances disclosed by the affidavits filed in this case, show, that a failure of justice will probably occur, unless the party who has without fault failed to obtain a new trial by appeal, is assisted with the process which he prays.

Let a certiorari issue, with leave to the plaintiff to amend his writ.

Baker v. *Moore.*

Debt on bond in the County Court of Hertford, where at May Sessions 1815, a verdict was found for the plaintiff, but by mistake in calculating interest or entering up the verdict there was a deficiency of $ 61 46. At August Sessions 1815, the mistake was dicovered and a rule obtained on the defendant to show cause why the verdict should not be amended and an execution issue for the deficient sum. This rule was made absolute at February Sessions 1816, and the defendant appealed to the Superior Court, whence the case was transmitted to this Court.

Browne, in support of the amendment, cited 1 *Wils.* 33. 2 *Str.* 1197. 1 *Salk.* 47. *Dougl.* 376. 3 *Term Rep.* 349, 659, 749.

PER CURIAM.

This is a motion to amend the verdict after judgment, and where there is nothing to amend by. We recollect no precedent of such a case. To permit it here, would be to make a new verdict for the jury.

Motion overruled.

Administrator of Allen v. *Peden.*

Detinue for two mulatto children born of a negro woman slave, and reputed to be the children of Allen, who in his lifetime conveyed some property to each of them, and on the back of the deed, expressed a desire that they should be emancipated. After the death of Allen, administration with the will annexed was granted to the plaintiff, and the Legislature, without his consent, passed an act emancipating the children sued for.

CAMERON, J. delivered the opinion of the Court:

The administrator in this case, was, in law the owner of the persons emancipated by the General Assembly. The act of emancipation passed not only without his consent, but against it. However laudable the motives which led to the act of emancipation, it is too plainly in violation of the fundamental law of the land, to be sanctioned by judicial authority.

We are compelled to pronounce it a nullity, and to give Judgment for the plaintiff.

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4. Where a Testator by his Will has created difficulties, the costs ought to be paid out of his assets,—in a Court of Equity....*Maurice* v. *Bateman*, - 464
5. Therefore persons named Executors in a Will which has been proved, who fairly contest the Probate of a Will which is produced after a considerable interval, and under circumstances fitted to awaken suspicion, though afterwards established may charge the expense of litigation upon the Estate, *Ibid.*
6. Where the Lessor of the Plaintiff in Ejectment enters on the Premises, he becomes liable to pay the Costs of the Suit....*Gubbs* v. *Ellis*, 612

See *New Trial* 2. *Practice* 7.

Constitutionality of a Law.

1. That part of the Suspension Act which authorizes Bonds to be given to the Sheriff having an Execution in his hands, and Execution to issue on such Bonds, is Constitutional.....*Berry* v. *Haines*, *Page* 425
2. A Law may be valid in some parts though in others it infringe the Constitution; and as only such parts of the Suspension Law are void as impair the obligation of Contracts, the other parts are valid and obligatory, *Ibid.*
3. Therefore a Security who had executed a Bond under the Act, was held liable to an Execution without suit, and without notice of a Judgment to be moved for against him, *Ibid.*

Covenant.

1. Where a person sold a Slave *about eleven years of age, sound and healthy, and do by these Presents further covenant and agree to warrant the right and defend the title of the said Slave*, it was held to amount to a warranty of soundness.....*Gilchrist* v. *Mann*, 667

See *Action* 2, 3.

Consideration.

1. A Deed cannot operate as a Bargain and Sale, unless it has a pecuniary consideration...*Blount* v. *Blount*, 587
2. Nor as a Covenant to stand seised to uses, unless the consideration be affection to a near Relation, or Marriage, *Ibid.*
3. But love and affection to an illegitimate Child is not a sufficient consideration to raise a use in a Covenant to stand seised, *Ibid.*

D.

Delivery.

1. Delivery is necessary to complete the Gift of a Chattel unless it be granted by Deed, or is incapable of Delivery...*Bullock* v. *Tanner*, 271
2. Therefore where a Father, the day after the death of his Son, relinquished to the Widow of the latter, all the right which he had to a distributive share of his Son's Estate, but without Deed or Delivery, and in the absence of the Widow, the Court of Equity sustained a Bill afterwards instituted by the Father to recover his share of the Personal Estate, *Ibid.*
3. A Bill of Sale, like other Deeds, takes effect from the Delivery. A Bill of Sale which purported on the face of it to have been executed on the 10th of November 1810, but which was attested by the only subscribing witness on the 10th January 1811, was held to have been delivered at the last period, there being no proofs of any prior Delivery.... *Nichols* v. *Palmer*, 436

Descent.

1. A person seised in fee before 1784, devised Lands to his Heir at Law, in tail, the Heir took by purchase...*Ballard* v. *Griffin* 258
2. And the Act of 1784 which subsequently converted the Estate Tail into a Fee, did not change the original form of acquisition, which still continued to be by purchase,
3. Therefore where such Devisee died leaving Heirs at Law on the Paternal Line, & a Half-Brother and Sister on the Maternal Line, it was held that the latter were entitled to the Inheritance, *Ibid.*
4. Where a Devisee takes the same Estate under the Will which he would have done had the Ancestor died intestate, he is in by Descent, and the Devise is void, *University* v. *Holstead*, 406
5. Where a Testator devised land to be equally divided between his two daughters T and G, to them and their heirs for ever, they took as Tenants in Common; and as they were the Testator's Heirs at Law, they would so have taken, had he died intestate,

6. Therefore the Mother surviving the Daughters, both of whom died without Issue, was held not to be entitled to a Life Estate under the Act of 1784, c. 22 ;—because the derivation from the Parent there adverted to, signifies by same Act *inter vivos*, *Page* 406

7. The Aunt of the whole blood on the side of the mother, from whom the Lands were derived by Descent, shall take in exclusion of a Brother of the half blood on the side of the Father...*Hilliard* v. *Moore*, 599

8. Therefore where A died seized in Fee of Land which descended upon his three daughters, and was divided between them, one of them, M, intermarried with H, by whom she had issue a Son, R ; M died, and H married another Wife, by whom he had issue a Son and a Daughter, E and F ; R died, and then his Father, H. In a Suit brought by the two surviving Daughters of A against E and F the Half-Brother and Sister of R, on the Paternal side, it was held that the two daughters were entitled to recover, *Ibid.*

Devise.

1. A man devised 'to his Grandson, A L, 350 acres of land, being the upper part of a tract of 700 acres ;—also to his Granddaughters, P L and J L, the lower part of the same tract, to be equally divided between them.' Upon the land being surveyed after the death of the Testator it was found to contain 1100 acres, and it was held that the Grandson, A L was entitled only to 350 acres, and the Granddaughters to 375 each....*Williams* v. *Lane*, 266

2. For the meaning of the Testator is to prevail when it can fairly be inferred from his language, and does not contravene any Rule of Law, *Ibid.*

3. It does not follow from the Testator's describing the tract as containing 700 acres, and giving to the Grandson 350, being the upper part of the same, that he intended to give him one half of the tract, *Ibid.*

4. If the tract had contained 500 acres, the Court could not have said the Grandson should have only 250, against the express Devise of 350.

5. Describing a tract of land as containing a specific number of acres, is the same as a description of a tract of so many acres more or less, *Ibid.*

6. Where the Ancestor takes an Estate of Freehold, and in the same Gift or Conveyance an Estate is limited to his Heirs in Fee or in Tail, the *Heirs* are words of limitation and not of purchase...*Williams* v. *Holly* 286

7. Where there is no intermediate Estate, the remainder is executed in the Ancestor, and if both are legal estates they coalesce.

8. Therefore where a Testator devised Land to his Daughter A B, to her and her Husband during each of their lifetimes and no longer, if dying without any lawful Heirs begotten of their bodies, and if dying without any lawful Heir to that and its Heirs for ever,' it was held that upon the death of the Husband it survived to the Wife in fee, *Ibid.*

9. A Testator devised to his Son in Law and Daughter his large Tavern in Fayetteville, excepting the Room over the Store which is to belong to the Store. And by another Clause he devised to his Wife the Store adjoining the Tavern, and after her death to his Son the Plaintiff. It was held that the ground in the rear of both Buildings which adjoined each other, passed under the Devise of the Tavern.....*Barge* v. *Wilson*, 396

10 For the exception of the Room over the Store indicates a belief in the Testator that he would have conveyed that too under the Devise of the Tavern, without such exception. And a Cur-

tilage to a Tavern in a Town is of indispensable necessity, *P.* 396

11. Where a man devised Land to B B, to him and his Heirs of his body lawfully begotten; and for want of such, one half to the Heirs of M P, and the other half to the Heirs of M T B or the survivors of them, to have all.—B B died without issue, and M T B about twenty years afterwards without issue. Neither M P nor any of her children were ever in this County. This was held to be a contingent remainder which never vested in the heirs of M T B, as she survived the Testator....*Chessum* v. *Smith*, 393

Distribution.

1. Where a person settled upon several of his children lands, and by his last Will devised and bequeathed to them lands and chattels, with the exception of one of his daughters as to land, but to whom he bequeathed a full share of his personals. The Testator died intestate as to one tract of land, and upon a Petition filed by the daughter it was held, that the Children of the Testator upon whom lands have been settled either by Deed or Demise, and his Grandchildren upon whose Parents similar Settlements had been made, must bring all such Lands into Hotchpot, if they claim to share with the Daughter in the Tract of which the Testator died intestate....*Norwood* v. *Branch*, 598

Dower.

1. Where a Woman before Marriage enters in an Agreement with her intended Husband, that she would claim no Dower in the Lands of which he was then seised, or shall afterwards become seised; it was held that such Agreement did not operate upon any Lands he might afterwards acquire.....*Arrington* v. *Arrington*, 253

E.

Error.

1. Where a Joint Action of Assumpsit is brought against two, and the Jury find that one did assume and the other did not; Judgment may be entered up against one, and it is no Error.... *Jones* v. *Ross*, *Page* 450

Estoppel.

1. Executors are not estopped to claim Lands in a Deed which they have endorsed and attempted to confirm under an express reference to the powers confided to them by the Will of the Testator....*Hendricks* v. *Mendenhall*, 569

2. In the execution of a power it is not necessary to recite that the act is done by virtue of the power, but it is sufficient if it can be done *only* in virtue of it; for the purpose of the act can only be explained by resorting to the power, *Ibid.*

3. Where an Executor hired Negroes to the Defendant, he cannot refuse to restore them at the end of the term upon the ground that they belonged to a Legatee, to whose Legacy the Executor had assented...*Dinwiddie* v. *Carrington*, 469

4. Where a person accepts a Lease, neither himself nor those claiming under him, can say that the Lessor has no right to recover the Rents and Profits....*Sacarissa* v. *Longboard*, 455

Evidence.

1. In an Action by the Father for the Seduction of his Daughter, her Examination taken before two Magistrates under the Act of 1741, is not admissible Evidence against the Defendant to prove the Fact.....*M'Farland* v. *Shaw*, 102

2. But it is competent for the Father to give in Evidence the Dying Declarations of the Daugh-

ter, wherein she charged the Defendant with being the Seducer, *Ibid.*

3. A Certificate of a Clerk of a County Court in Virginia that a person became naturalized in that State by taking the oath, which Certificate is further attested by the presiding Magistrate of the same Court, is proper Evidence of the Naturalization....*Teare* v. *White*, 112

4. In an Action brought against a Constable for neglect of Duty, whereby the Plaintiff lost the amount of a Judgment which he recovered of L, it is essential that the Plaintiff prove his account against L....*Parker* v. *Wood* 248

5. Parol Evidence cannot be received to contradict, vary, or add to a Written Instrument; but to explain or elucidate it, it may be received.....*Clark* v. *M'Millan*, 65

6. Therefore where the Defendant gave the Plaintiff a Writing not under Seal acknowledging the sale of a Note of Hand and the receipt of part Payment, and that the balance was to be paid when the money was collected; the plaintiff was not allowed to prove by parol that the Defendant, at the time of contract promised to commence an action within ten days against the payers of the Note, *Ibid.*

7. Presumptive Evidence ought not to be erected on surmise, but on a solid foundation, and is only created when the circumstances are such as to render the opposite supposition improbable: it ought also to be stronger to defeat a right than to support it.—The facts from which a presumption is deduced, ought to be consistent with the proposition they are intended to establish....*Lenox* v. *Greene & al.* 281

8. Where the acts of a person can be given in Evidence for him, his declaration in relation to such acts are also proper Evidence, as in the case of a claim, demand or tender....*Shenck* v. *Hutcheson*, *Page* 432

9. The Interest to disqualify a Witness must exist at the time of Trial, and if before then the Witness removes, the Interest, or does all he can to remove it, his competency is restored..... *Perry* v. *Fleming*, 458

10. If a Witness deposits a Release in the Clerk's Office, the Plaintiff being absent, it will restore his competency in a case where he was beneficially interested in the recovery, *Ibid.*

11. A Grant can never be presumed, unless the party claiming the benefit of such presumption, proves the actual possession of the Land....*Cutlar* v. *Blackman*, 567

12. Parol Evidence cannot be received to prove the contents of a Written Contract, unless it be first clearly proved that the Writing is lost by time or accident....*M'Farland* v. *Patterson*, 619

13. Where a Trustee has a Legal Interest in the Estate, but is in all other respects nominal, he cannot be examined at Law as to the merits or design of the Deed, but may in Equity....*Hawkins* v. *Hawkins*, 627

14. The Rule of admitting Hearsay to prove the Boundaries of Land, must be confined to what deceased persons have said; for if they are alive at the time of Trial, though out of the State, their Depositions ought to be procured..... *Gervin* v. *Meredith*, 635

15. A Presumption in Law arises from the payment of the last Instalment upon a Bond that the preceding ones have been paid, provided it has been made in the manner and at the time contemplated by the parties; *secus* it is a presumption that the parties are acting under a new agreement.....*Ward* v. *Green*, 108

16. Parol Evidence cannot be re-

ceived to contradict the Records of a County Court confirming the Report of a Jury who laid out a Road.....*Cline* v. *Lemon*, - - *Page* 439

See *Probate* 1.

Equity.

1. A Creditor or next of kin cannot without special circumstances, call upon a Debtor to the Estate; but a Bill will be entertained for both against all persons in possession of the Fund who have not paid for it a valuable consideration....*Blanchard's Heirs* v. *M'Laughan's Administrators*, 402
2. The Jurisdiction of this Court over Trusts can only be taken away by showing a complete Execution....*Jordan* v. *Jordan's Executors*, 409
3. Equity will consider a person who enters upon the Estate of an Infant and continues the possession, as a Guardian to the infant, and will decree an Account against him.....*Parmentier* v. *Phillips*, 411
4. Even where the Title is purely legal, and the Complainant is put to his election to proceed at Law or in this Court, where the Bill is filed for Land and the mesne profits, he may proceed at Law for the Possession and in Equity for the Account, *Ib.* 412
5. An equitable Right in Land is subject to Execution and Sale, and a Bona Fide Purchase is not liable to pay the Balance of the Judgment, where the Land sells for less, although the Execution issues at the Suit of the legal owner, and the equitable owner is insolvent...*Deaton* v. *Gains* 620
6. A Court of Equity still retains its Jurisdiction in cases of contribution of one Surety against others, notwithstanding the Statutory Jurisdiction given to Courts of Law.....*Shepherd* v. *Monroe*, - - 624

See *Administrator* 7. *Action* 13..... 1, 2, 3. *Costs* 4. *Practice* 5, 6. *Trust*.

F.

Ferry.

1. Individual interest ought not to be sacrificed but for the purpose of advancing a clear and unequivocal Public Benefit...*Beard* v. *Merrill*, 69
2. Where an antient Ferry has been established and duly kept, the Court will not erect a new one unless it be evident that the Public sustains an inconvenience from the want of it; but the Public Faith pledged to the first Grantee ought not to be violated upon a speculative possibility of general convenience, *Ibid.*

Fraud.

1. A prior voluntary Conveyance shall prevail against that of a subsequent purchase, unless the latter is fair and honest....*Squire* v. *Riggs*, 274
2. Thus where A, in consideration of Blood conveyed his Land to his only Child, and afterwards for a valuable consideration sold the same Land to B, but with the intention of defrauding his Creditors, in a Suit by the Child against the Purchaser under B, with Notice, Judgment was rendered for the Child, *Ibid.*
3. Inadequacy of consideration, embarrassed circumstances in the Alienor, his remaining in possession of the Land after the Sale, the secrecy of the transaction, form a combination of presumptions indicative of Fraud ....*Darden* v. *Skinner*, 279

G.

Gift.

1. Since the Act of 1806, a Written Transfer is necessary in all Cases where Slaves are given..... *Cotton* v. *Powell*, 432
2. The 3d section of the Act of 106 relates to adverse Claims..... *Drew* v. *Drew*, 437

I.

Indictment.

1. Where there is one continuing transaction, though there be several distinct asportations in Law, yet the party may be indicted for the final carrying away, and all who concur are guilty though they were privy to the first or intermediate acts..... *State* v. *Trexler*, *Page* 94

2. The snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it or any violence done to the person, the taking is a robbery, *Ibid.*

3. An Indictment cannot be supported which charges a person with stealing a thing destitute of both intrinsic and artificial value....*State* v. *Bryant*, 269

4. Therefore an Indictment was quashed which charged a person with Larceny in stealing *one half Ten-Shilling Bill of the Currency of the State*, *Ibid.*

5. Where a Slave is convicted of Horse-stealing, the punishment is for the first offence whipping and the loss of ears; for the second, death....*State* v. *Levin*, 270

6. Judgment will not be arrested because the *Venire* returned to the Superior Court consisted of forty instead of thirty Jurors; nor because one of the Grand Jury was on the Coroner's Inquest....*State* v. *M'Entire*, 287

7. Indictment for Malicious Mischief will not lie where the Defendant took a Mare from his Corn Field, where she was damaging his growing Corn, to a secret part of the County, where he inflicted the wound with a view of preventing the repetition of the injury...*State* v. *Landreth*, - - 446

8. An Indictment will lie against the Commissioners of Fayetteville for not repairing the Streets ...*State* v. *Commissioners*, 617

9. It is necessary to prove that an Overseer of the Road was served with Notice of his Appointment ten days before he is liable to be indicted....*State* v. *Everitt*, - - *Page* 633

10. Where in an Indictmen against a Register, the Jury find that he took more than the Legal Fees, but not corruptly; such finding is equivalent to a Verdict of Acquittal....*State* v. *Bright*, 634

11. A person may be indicted for stealing a runaway Slave, knowing him to be run away, and whom he belonged to....*State* v. *Davis*, 291

12. Judgment will be arrested where the property stolen is laid as belonging to a deceased person, *Ibid.*

JURISDICTION—See *Abatement* 7.

JUDGMENT—See *Error* 1.

Indorsement.

1. Where a Note was endorsed in the following manner "Pay the Contents to W or his Order for Value received, with recourse to me at any time hereafter, without further Notice," it was held that a Cause of Action accrued against the Indorser from the return of an Execution against the Drawer, by which nothing was made....*Wistar* v. *Tate*, 602

Insolvent Law.

I. A Creditor who is a Citizen of this State may attach the property of his Debtor found here, though such Debtor is a Citizen of N. York, and by an Insolvent Law of that State his property has been assigned for the general benefit of all his Creditors...*Bizzell* v. *Bedient*, 254

Interest.

1. A Guardian is accountable for Interest on the accumulated balance of Principal and Interest annually, after deducting the necessary expenses of his Ward ... *Branch* v. *Arrington*, 252

Indian Title.

1. The Grant made by the Governor in 1717 to the Tuscarora Tribe of Indians is absolute and unconditional, and does not require the residence of the Indians upon the land....*Sacarusa & Longboard* v. *The Heirs of William King*, *Page* 451
2. The Proviso in the Act of 1748, c. 3, § 3, being in derogation of rights actually vested in the Plaintiff cannot be regarded.—
3. But if the Assembly of 1748, could rightfully superadd the condition contained in the Proviso, subsequent Legislatures had an equal right to modify or abrogate it.
4. And the Acts of 1778, c. 16, and of 1802, make a different appropriation of the Land on the happening of either of the events mentioned in the Act of 1778 from that made by the Act of 1748.

L.

Legacy.

1. The Executors assent to the first taker is an assent to all the subsequent takers of a Legacy limited over by way of remainder or executory Devise.....*Dinwiddie's Ex'ors.* v. *Carrington.*
2. But this Rule does not prevail where after the death of the first taker, the Executor has a Trust to perform arising out of the property, which therefore must be subjected to his control, - - *Ibid.*

Letter of Guaranty.

1. Where the Defendant undertakes in a Letter to the Plaintiff that he will guarantee any Contract which F shall make with him for a vessel and cargo, and F makes a Contract for the same, but does not comply with it, the Defendant became pledged to the same extent that F was bound, as soon as the Plaintiff parted with his property....*Williams* v. *Collins*, 584
2. For it was the Defendant who was principally relied on, and it was incumbent on him to guard against F's failure; and to hasten the Plaintiff or provide for his own safety, *Ibid.*
3. The Guaranty made by an Indorsor is a conditional one;—here it is absolute. The undertaking is that F *should* comply, not that he should be *able* to comply, *Ibid.*

Limitation of Suits.

1. It is a fixed rule of property that the possession under a colour of Title, to enable a person to recover in Ejectment, must be a continual one of seven years..... *Jones* v. *Ridley*, 397
2. Where a Mortgagor is permitted to remain in possession of the Land, and after the Mortgage is forfeited he sells to another, who has no Notice and who together with his Alienees continue in possession for seven years, that amounts to a Title....*Baker* v. *Evans*, 614

N.

New Trial.

1. The Court may award a New Trial in an Action of Slander where the Jury acquit the Defendant against Evidence, and in a case where exemplary damages ought to have been given.... *Harker and wife* v. *Reavis*, 276
2. Where, in an Ejectment the Plaintiff's Counsel struck out from the Docket the appearance and plea entered for the Defendant, in consequence of his having failed to give Bond for the Costs, and then obtained possession under a Writ, the Court ordered a New Trial upon the Defendant's making an Affidavit that he would have given Security for the Costs had he known it to be necessary, and that he believed he had a good title to the land....*Beamer* v. *Pilley*, 444

See *Will* 5. *Practice* 7.

NUISANCE—See *Abatement* 11.—*Action* 4.

Notice.

1. A Notice to take Depositions on one of 3 days which are specified, where the Witness lives in Georgia, is sufficient...*Harris* v. *Peterson*, *Page* 471

P.

Practice.

1. In considering the propriety of sustaining or dismissing a Certiorari, the Court will not notice Affidavits on either side, which have been made and sworn to since the Case was transferred to this Court....*M'Millan* v. *Smith* - - 77
2. Where a person applies for the extraordinary remedy of a Certiorari, he ought to show good reason why he did not avail himself of the ordinary remedy by Appeal, *Ibid.*
3. Where a Judgment is rendered on the first day of a County Court, and the Defendant makes no attempt to appeal, nor accounts for not doing so, a Certiorari ought not to be granted, and if granted, ought to be dismissed, *Ibid.*
4. Although a Suit has been depending for several Terms, yet if a party applies for the removal the first Term he becomes interested, and makes out a sufficient cause in other respects, he is entitled to removal....*Knowis* v. *Baker*, 98
5. Where a Bill in Equity is served upon a party who neglects to answer and the Bill is taken *pro confesso* and the Cause set for hearing, after which he died, the Administrators shall be allowed to answer upon their making Affidavit that the Intestate for a considerable time previous to his death was reduced to such a state of mental debility as unfitted him for business....*Haywood* v. *Coman & al.* 116
6. But in such case the Complainant shall retain the Benefit of the Testimony taken without Notice, while the Judgment *pro confesso* was in force, *Ibid.*
7. Where a Cause is called in course on the second day of the Term and the Plaintiff not appearing, is nonsuited; he afterwards stated in an Affidavit that he had gone home the preceding night to procure the attendance of a material Witness, but who through illness could not attend, and that the Plaintiff could not reach Court in time—If in such case a New Trial is granted, it ought to be on the payment of all the Costs.....*Williams* v. *Harper*, 401
8. Where a Petition is filed to set aside the Probate of a Will, it must indispensably be accompanied with an Affidavit....*Moss & Wife* v. *Vincent*, 414
9. And an Affidavit made before a Justice of the Peace of one County where the Petition is filed in another, is not sufficient.... *Jeffreys & al.* v. *Alston & al.* 634
10. Where a Replication is filed to an Answer, the Complainant may have the Opinion of a Jury on the Facts at issue, and the regular course in such case is to set the Cause for hearing absolutely or with such provisions as the Court may direct;—but not to dismiss the Bill....*Marshall* v. *Marshall*, 435
11. If the Clerk of the County Court neglect to take a Bond from the party previously to issuing a Certiorari, the Court will not dismiss the Writ, but permit the party to file a Bond when the Record is returned to the Superior Court....*Rosseau* v. *Thornberry*, 442
12. Where the party has merits on his side, and discloses a case whence the inference is clear that he had no opportunity of making defence, the Certiorari ought to be sustained....*Dyer* v. *Rich*, 610

13. Where a Will is exhibited for Probate in a County Court from which there is an Appeal to the Superior Court, whence it is removed to an adjoining County where the trial takes place, & the Will is established, a Petition to rehear must be filed in the latter County; and a Petition filed in the first County was dismissed for that cause....*Harper* v. *Gray*, - *Page* 613

14. What description of Lands in a Declaration of Ejectment is certain enough to warrant a Writ of Possession.....*Boyd* v. *Clark*, - - 622

15. A Certiorari will be granted where the Appeal Bond is not sent up through the omission of the Clerk or the person transacting business in his absence..... *Steele* v. *Harris*, 636

See *Costs* 6.

Probate.

1. Though the Clerk's Certificate of the Probate of a Will do not state that it was proved to have been executed by Two Witnesses in presence of the Testator, yet if upon Trial it is proved that in Point of Fact it was *so* executed, it is sufficient....*Ex'ors of Henry* v. *Ballard & Slad*.

S,

Sheriff.

1. A Return upon a Subpœna made in the name of a person who subscribes himself D S, by which is understood Deputy Sheriff, is insufficient....*Holding* v. *Holding* - - 410

2. The Court cannot judicially know a person deputed by the Sheriff to act for him, because his authority to act rests upon the private delegation of the Sheriff, *Ibid.*

3. The Return of a Sheriff is upon Oath and therefore concludes a party, but the Return of a person styling himself Deputy Sheriff has no greater verity than that of any private individual, *Ibid.*

Scire Facias.

1. Where a Scire Facias against a defaulting Witness omits to insert the sum which has accrued from the forfeiture, it is an incurable objection, 410

Slaves.

1. The Act of 1791 which gives a Penalty for harbouring and maintaining Slaves, is thus to be construed. Harboring means a fraudulent concealment;—and the maintaining also, must be secret and fraudulent....*Dark* v. *Marsh*, - - 249

2. General Expressions shall not render penal by construction, any Act which does not partake of the qualities of the Act specially set forth.

3. Therefore where the Defendant openly maintained Negroes claimed by the Plaintiff to whom he gave notice that he should retain them until recovered by Law, it was held that an Action under the Statute could not be sustained. *Ibid.*

T.

Trespass.

1. The Plaintiff in an Action of Trespass *quare clausum fregit*, must show that when the Trespass was committed, he had either actual or constructive possession of the Premises....*M'Millan* v. *Heffley*, 89

2. Constructive Possession exists only where the party claiming has Title to the Land and there is no one in actual possession, claiming under an adverse Title, - - *Ibid.*

3. Therefore where the Plaintiff purchased a Tract of Land sold under Execution on the 10th of November 1804, but the Conveyance was not made till the 18th July 1805, between which periods the Trespass was com-

mitted, it was held that the Plaintiff could not recover, *Ibid.*

Title.

1. Where Land was conveyed by A to B, by B to C, by C to D, and by D to E, each with Warranty, and F recovered the Land from E, who received the consideration money from the Representatives of C, and C's Representatives received the consideration money from the Representatives of B—In an Ejectment brought by the Heir at Law of B, it was held that he was not entitled to recover, as his Ancestor had conveyed the Land, and nothing descended to the Heir: That the repayment of the purchase money could not operate as a reconveyance....*Clayton and wife* v. *Markham*, 115

Trust.

1. Where a Deed not operating by way of Trust, contemplates the passing two legal Estates, one to succeed the other, the last Limitation is void....*Dowd* v. *Montgomery*, 100
2. Where a Suit is brought on a Note in the name of the person to whom it is made payable, but an Indorsement on the Writ states that the Suit is instituted for the use of A, and it is also shown by Affidavits that A has the beneficial interest in the Note, the Court will nevertheless permit the Attorney in Fact of the Plaintiff on record to dismiss the Suit....*Jones* v. *Blackledge*, 457
3. For Courts of Law ought to confine themselves to the consideration of Legal Rights, *Ibid.*
4. And where the Defendant showed that the Plaintiff had during the pendency of the Suit, sold the Bond to a person with whom the Defendant settled, and to whom he had made satisfaction, it was held that the Plaintiff on Record had a right to recover, ...*Arrington* v. *Horne*, 631
5. Where a Testator bequeathed to his Executors, after the death of his Sister, his Slaves, in Trust, to have them set free by the Laws of the State, and also devised and bequeathed to his Executors real and personal Property, for the use of his Slaves, it was held that such a Trust was void....*Haywood* v. *Craven's Executors*, 557
6. For the Law has prescribed one mode only, in which Slaves can be liberated, the principle and policy of which, can, by no construction, be applied to this case, - - *Ibid.*
7. A charitable purpose under the Statute of Elizabeth, must be so described in the Will, that the Law will, at once, acknowledge it to be such.
8. Wherever the intention is to create a Trust, which cannot be disposed of, it reverts to the Heir at Law or next of kin, - - *Ibid.*

See *Equity* 2.

W.

Will.

1. Though a Paper Writing be called a Deed in the body of it, and the party is advised to make a Deed, yet if the structure and operation of the Writing show it to be Testamentary and made with a view to the disposition of a man's Estate upon his death; it will enure as a Will....*Ex'ors of Henry* v. *Ballard & Slade.*
2. An infant under the age of 18 years, cannot dispose of his Personal Estate by Will.
3. The Common Law has fixed upon the age of 21 as the earliest period when the mind can judge with discretion; and the Rules established in the Ecclesiastical Court, allowing infants to make Wills sooner, have never been in force and use, in this State....*Williams* v. *Baker*, 599
4. Where a person makes a Will and dies and his Widow dissents, she is not entitled to a Year's Al-

lowance under the Act of 1796, c. 29.....*Collins v. Collins*, P. 417

5. Where on the Trial of the Issue *devisavit vel non*, the Will was attested by two Witnesses, one of whom was absent from the State, and whose credibility was impeached at the Trial, so that the Will was proved only by the other, whose Testimony, if credible, the Court instructed the Jury was sufficient to establish the Will, although the absent Witness was proved incredible; the Jury set aside the Will and a New Trial was refused..... *Wright* v. *Wright*, 625

See *Probate* 1.

Witness.

1. Under the Act of 1792, c. 6, a subscribing Witness is not necessary to a Mortgage Deed of Slaves, where the contest is between the parties, or those claiming under them, and there are no conflicting Claims of Creditors or third persons....*Collins* v. *Powell*, 431

Words.

1. Where the Defendant uttered the following Words of the Plaintiff, "He, one of our little Chowan Justices of the Peace, was taken up a few nights ago playing Cards with Negro Quomana, in a rookery box, and committed to Jail, and remained there until next day nine or ten o'clock, and then was turned out and split for the Country." The Judgment was arrested, as they impute no crime which if true, would subject the Plaintiff to infamous punishment; and the Declaration did not charge that the Plaintiff was a Justice, or that they were spoken of him in relation to his Office....*M'Guire* v. *Blair*, 443

N. B. The Abridgment of the Acts of Assembly begins in the 1st Volume, at the Pages 114 and 400;—In the 2d Volume, at the Pages 125 and 474.

The British Statutes, in the 1st Volume, begin at Page 549;—In the 2d Volume, at Page 294.

ERRATA.

In the Index, page 642, bottom line of the 1st column, for "case of debt" read "case of tort." In the 648th page, 1st column and 14th line from the top, for "County" read "Country."